Office Supreme Court, U. S.
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United States Supreme Court,

OCTOBER TERM, 1907.

No. 206.

IN EQUITY.

THE OLD DOMINION COPPER MINING & SMELTING COMPANY,

Petitioner,

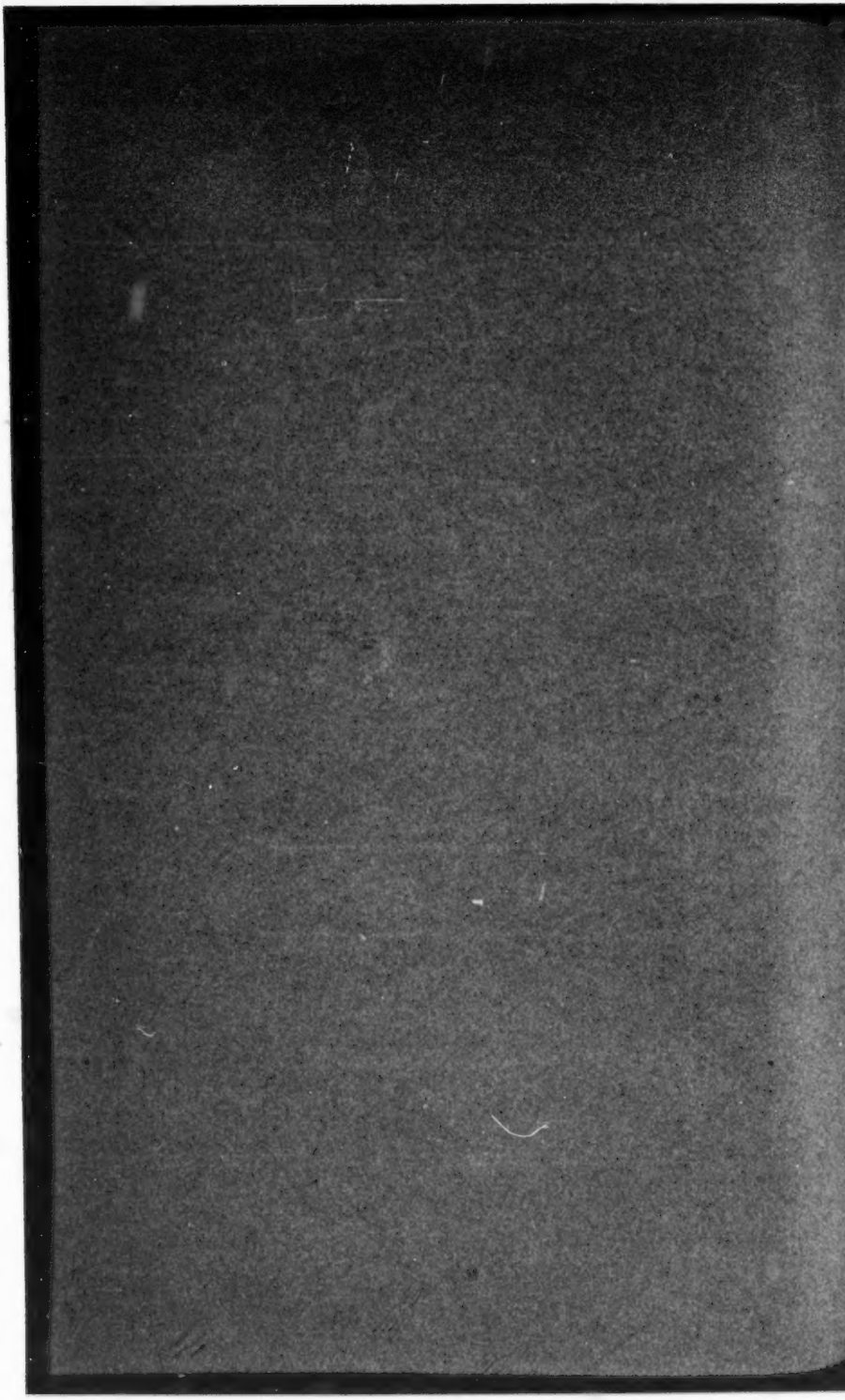
against

FREDERICK LEWISOHN ET AL.,

Respondents.

RESPONDENTS' BRIEF.

EDWARD LAUTERBACH,
EUGENE TREADWELL,
Counsel for Respondents.



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RESPONDENTS' BRIEF.

ON CERTIORARI TO THE CIRCUIT COURT FOR THE SECOND CIRCUIT TO REVIEW THE DECISION OF THAT COURT AFFIRMING THE DECREE OF THE CIRCUIT COURT OF THE SOUTHERN DISTRICT OF NEW YORK DISMISSING COMPLAINANT'S BILL ON DEMURRER.

Statement.

The bill of complaint stripped of immaterial allegations, conclusions of law, and mere verbiage, presents a claim concisely stated as follows :

May 27th, 1895, Lewisohn and Bigelow bought all the capital stock of the Baltimore Company owned by the Simpson estate (*fol.* 7), and in June, bought the remaining capital stock of the Baltimore Company owned by Keyser, and also acquired the mining properties held by Keyser for the Baltimore Company (*fol.* 8, p. 5). May 28th, 1895, they gave *their* notes indorsed by Lewisohn Brothers (*fols.* 7–9) for the Simpson stock. In June, 1895, they gave like notes for the Keyser

stock. By July 8th, 1895, all the notes had been paid in full (*fol.* 16). The **Syndicate Associates** *by agreement were to pay* their respective subscriptions (*fol.* 6) as follows: 14 per cent., May 27th; 28 per cent., July 28th; 28 per cent., Aug. 25th, and 28 per cent., Sept. 24th.

July 8, 1895, Lewisohn and Bigelow organized a New Jersey corporation, the complainant (p. 6, Pars. Ninth and Tenth), with an authorized capital stock of 150,000 shares of the par value of $25 each, Lewisohn and Bigelow themselves or through their representatives subscribing for all of the stock necessary to complete the organization of the company, and furnishing it with a board of directors composed of themselves or their representatives in interest. Lewisohn and Bigelow **on July 11th, 1895,** as owners of the capital stock of the Baltimore Company sold and complainant bought (p. 8, Par. Thirteenth) all the property of Baltimore Company, for 100,000 shares of the complainant company's stock. **On the same date** they also sold to, and the company bought, the mining properties above mentioned (Par. Fourteenth), known as the Keyser properties, for 30,000 shares of the company's stock.

Possession of *all* the above-mentioned property was delivered to the **company July 12th, 1895** (pp. 9, 10).

The **associates in the syndicate** *were by agreement* parties to the purposes and transactions of Bigelow and Lewisohn (Pars. Third and Fourth, *fol.* 25) and were by the argeement (p. 4) to get back in cash their respective advances and also to share *pro rata* in *cash* or in stock, with Bigelow and Lewisohn in the profits of the sale of *all of* the properties (*fol.* 25), and in fact were later offered repayment in cash of their advances (p. 12), and *did* receive *profits* in stock of

100 per cent. on their advances (Par. Nineteenth, p. 12), applying the amounts of their respective advances to the purchase of additional stock from Lewisohn and Bigelow personally. At the time of these transactions Lewisohn and Bigelow were directors of the complainant company and (Par. Eleventh), together with their representatives, constituted the entire board of the company, and owned the entire issue of stock of the company, holding the same either in their own name or in the name of representatives wholly under their control. Thereafter **on July 18th, 1895,** the company, still under the control of Lewisohn and Bigelow as its directors, was caused by them to *offer* to the public at *par* for cash (p. 9, *fol.* 15), 20,000 additional shares of capital stock, the remainder of the authorized capital stock of the company. The time when this stock was *subscribed* for is not specified as any earlier date than September 18th, 1895. It is further alleged that the mining properties acquired by Lewisohn and Bigelow from the Baltimore company did not cost Lewisohn and Bigelow more than, or were not fairly worth more than, $1,000,000 (*fol.* 18), and that the mining properties acquired by Lewisohn and Bigelow from Keyser cost Lewisohn and Bigelow nothing and were not fairly worth more than $5,000 (*fol.* 18). The bill also alleges that the shares of the complainant company so exchanged for the property and so sold for cash as above mentioned were, at the time, *of the fair market value of $25 each* (*fol.* 20), *and continued for a long time thereafter to be of such or greater value; but no other property of any kind is claimed ever to have been acquired by the company.* The complaint also alleges that no disclosure was made at any time either to their associates in the syndicate or to any of the purchasers or subscribers for the

remaining 20,000 shares additional stock (p. 10, *fol.* 18, p. 11), or to any purchasers thereof from them, of *the extent* of profit made by Lewisohn and Bigelow in the transfer to the complainant company of the properties above mentioned.

The complaint contains an offer of retransfer of the Keyser properties to the defendants (p. 16, *fols.* 29, 30), and prays for a rescission (*fol.* 30) of the sale of the Keyser properties and a return to the company of the 30,000 shares issued therefor, or in the alternative, the damages suffered by the complainant company.

Albert S. Bigelow is not made a party to the bill.

The foregoing constitute the pertinent allegations of the bill of complaint.

The cause came on for hearing upon the original bill of complaint and demurrer at the February Term, 1905, of the Circuit Court and the bill was dismissed by Judge Lacombe for want of equity (136 Fed. R., 915).

Leave to amend was had and complainant filed the present amended bill, in which numerous changes appeared, without changing the allegations contained in the original bill.

Defendants thereupon again demurred.

The first demurrer is that the bill is without equity and that it is also multifarious, in that it sets forth different and distinct causes which are inconsistent and cannot properly be joined and prays for reliefs inconsistent with each other, and is altogether multifarious.

The second demurrer is to so much of the bill as seeks to have rescission, and is based upon two grounds:

(1) That the bill does not state a case entitling complainant to rescission.

(2) That the bill on its face shows that Albert S. Bigelow is an indispensable party to a bill for rescission, *and that he is not made a party to the bill.*

Complainant's counsel on the argument of the demurrer at Circuit, to avoid the effect of the prior decision by Judge Lacombe, contended that amendment to the bill had changed the cause of action.

Complainant's counsel asserted that the allegations as set forth in the old bill of complaint permitted the conclusion to be drawn *that Bigelow* and *Lewisohn themselves*, and *not the company* caused by Bigelow and Lewisohn, obtained the subscriptions to 20,000 shares of the capital stock of the company for working capital

PLAIN LANGUAGE IN THE PREVIOUS BILL PRECLUDED ANY SUCH CONSTRUCTION.

Fifteenth Para., p. 9.
Para. Twenty-first, at p. 14, *fol.* 24.

The Circuit Court, HOLT, J., upon the argument, intimated that unless the original bill had been so amended as to present a substantially different cause of action, the decision of Judge LACOMBE would be followed, and later held (p. 23) the amended bill to be the same as the original bill and sustained the demurrer for want of equity on the authority of the decision by LACOMBE, J.

The case in the Massachusetts Supreme Court, 188 Mass., 315, against Bigelow will be considered later in this brief (p. 40, *post*).

No creditors interest is involved. No question as to unpaid stock is raised by the complaint or by petitioner in argument or cases cited.

No misrepresentation is alleged.

THE SOLE FAULT CHARGED IS NON-DISCLOSURE OF PROFIT.

Petitioner (Brief, Statement of Facts, p. 3) purports to state the substance of a decision of a single Justice of the Supreme Judicial Court of Massachusetts upon the merits. If such statement is warranted in the brief, we should, on the part of respondent, refer to a *later* suit, in Chancery of New Jersey, brought by Bigelow against the company to enjoin the further prosecution of the Massachusetts suits, wherein the affidavits filed show that the company and its stockholders had, prior to the bringing of the present suits, disposed of all, if any, interest in the claims herein asserted, and in all, if any, recovery thereon, a trust having been created to prosecute the claims, and separate certificates of fractional interest in any ultimate recovery having been issued under such trust and on sale in the Boston stock market at prices varying from thirty cents to three dollars, in which certificates neither the company nor the stockholders as such had any longer any interest or title, although the suit is brought in the name of the company under the trust. The price of three dollars per share was the price current after the rendition of the decision by the single Justice. The New Jersey Chancellor refused to modify his preliminary injunction after hearing motion for such modification, and upon the return day, and after further and full hearing, on March 17, 1908, made the injunction permanent until the further order of the Court.

The New Jersey suit is important as disposing of the *assumed protection* of *pretended* interests of associates and of subscribers, none of whom are complaining, and also as showing the real parties in interest to be speculators masking in the guise of the corporation.

ANALYSIS OF CASE.

FIRST.

There was no fraud upon the company.

I.

The sale by the directors was made with the acquiescence of all concerned, and not by promoters in any sense upon which liability to the corporation or subsequent subscribers could be predicated (*post*, pp. 11, 64).

II.

THE SALE WAS MADE VALID BY THE CONSCIOUS ACQUIESCENCE OF ALL PERSONS INTERESTED IN THE COMPANY.

1. All the persons who joined in the enterprise acquiesced in the transaction.

The **syndicate members** stood in the shoes of the directors and were not persons to whom disclosure was necessary, being equally with the directors **sellers** to the company and **sharing** in the **profits** of the sale (pp. 19–25).

2. Besides those acquiescing, no others joined as part of the original plan or enterprise.

(*a*) The persons who subscribed for the 20,000 shares issued for cash did not join as part of the original plan or of any plan or enterprise, nothing being stated in the bill of complaint to show either information offered to them or any knowledge on their part of any plan or enterprise (pp. 25–32).

(*b*) The enterprise joined in by the subscribers for the 20,000 shares was the enterprise as it **then existed,** namely, a corporation offering 20,000 shares at *par* for cash **without statement or inducement** of any kind (p. 30).

III.

DISCLOSURE TO THE SUBSCRIBERS WAS NOT REQUIRED.

The subscribers to the 20,000 shares were simply **vendees** to whom the vendor (company) stood in no fiduciary relation, no statement being offered **or questions asked** (*post*, pp. 32–34).

SECOND.

Lewisohn or Bigelow were not liable as promoters.

Lewisohn or Bigelow not being liable as promoters, the plaintiff corporation is not entitled to a rescission of the sale or a return of the consideration, or to an account of profits made by the sale (p. 65).

THIRD.

Rescission is the only relief for failure to disclose, without misrepresentation.

I.—If the sale had been made by Bigelow and Lewisohn without full knowledge and assent of all

parties interested and without disclosure of profit, rescission and return of the consideration would be the sole relief permissible, and only then where both of them were parties to the suit (p. 77).

II.—No alternative relief can be granted, the property having been purchased with private means and exchanged for the shares of the company without misrepresentation.

FOURTH.

Albert S. Bigelow is an indispensable party to this suit.

I.—The bill is for a rescission (p. 85).

II.—The relief sought cannot be granted without affecting the rights of Bigelow.

III.—Relief for rescission may not be granted on a several liability where the transfer was joint, as in the present case.

FIFTH.

Rescission of part of the transaction is not permissible.

I.—The property was all acquired in one transaction (p. 90).

II.—The company cannot keep part and return part.

SIXTH.

The bill is multifarious.

I.—The bill asks for different reliefs inconsistent with each other (p. 91).

The request for damages as for a tort is inconsistent with request for rescission. The former treats the transaction as **valid,** but requires damages; the latter treats the transaction as **invalid** and requires its rescission.

FIRST POINT.

The Company is without equity in the premises.

I.

THERE WAS NO FRAUD UPON THE COMPANY.

The Bill alleges that at the date of the transaction sought to be rescinded Bigelow and Lewisohn owned *all the stock* of the complainant, constituted *the entire stockholding interest* of the company and received all of the stock of the company issued, including the stock issued by the complainant for the property in question.

Record, p. 6, *fols.* 11, 12, p. 7, *fol.* 13, p. 14, *fol.* 24.

UNDER SUCH CIRCUMSTANCES THERE WAS NO ONE WHO COULD IN EQUITY COMPLAIN.

AUTHORITIES IN SUPPORT OF THE RULE.

1. Federal Courts.

Foster vs. *Seymour*, 23 Fed. Rep., 65; C. C. S., Dist. of N. Y.

McCracken vs. *Robison*, 57 Fed. Rep., 375; C. C. A., Second Circuit.

Stewart vs. *St. Louis, &c., R. Co.*, 41 Fed. Rep., 736, 738; C. C. D., Kansas.

DuPont vs. *Tilden*, 42 Fed. Rep., 87; C. C. N. D., Illinois.

Wood vs. *Corry Water Works*, 44 Fed. R., 146, 149, Pennsylvania.

Fort Madison Bank vs. *Alden*, 129 U. S., 373, 378.

2. State Courts.

New York. *Barr et al.* vs. *N. Y., L. E. & W. R. R. Co. et al.*, 125 N. Y., 263, 273.
Seymour vs. *Spring Forest Asso.*, 144 N. Y., 333.
Thornton vs. *Wabash Ry. Co.*, 81 N. Y., 462, 467.
Parsons vs. *Hayes*, 14 Abb. N. C., 419, 434.
King vs. *Barnes*, 109 N. Y., 267, 268.
Insurance Press vs. *Montauk Wire Co.*, 103 App. Div., 472 N. Y.
Blum vs. *Whitney*, 185 N. Y., 232.

Illinois. *Higgins* vs. *Lansingh*, 154 Ill., 301, 331, 336.

Wisconsin. *Spaulding and ano.* vs. *North Milwaukee Town Site Co.*, 106 Wis., 481, 488, 489.

California. *Garretson* vs. *Pacific Crude Oil Co.*, 146 Cal., 184.

Kansas. *St. L. F. S. & W. R. Co.* vs. *Tiernan*, 37 Kansas, 606, 633.
Walburne vs. *Chenault*, 43 Kansas, 356, 361.

Colo. *Arkansas, &c., Co.* vs. *Farmers, &c., Co.*, 13 Colo., 587.

Maryland. *Tompkins* vs. *Sperry Jones*, 96 Md., 560, 583.
Swift vs. *Smith*, 65 Md., 428, 435.

W. Virginia. *Merchants & M. S. B.* vs. *Belington C. & I. Co.*, 41 S. Eastern R., 390, 398.

Iowa. *Clark* vs. *American Coal Co.*, 17 L. R. A., 557, 561; 86 Iowa, 456; 53 N. W., 291.

Tennessee. *Divine* vs. *U. S. M. M. & Co.*, 38 South West. R., 93, 98.

3. English Cases.

In re Ambrose, L. R., 14 Ch. D., 390, 395, 396, 397, 399.
In re British Seamless Paper Co., L. R., 17 Ch. D., 467.
Salomon vs. *Salomon*, L. R. (1897) A. C., 22.

4. Text Writers.

Cook on Corporations, 5th Ed., § 46, pp. 125, 135; § 47, p. 139, § 649, pp. 1461, 1462.
Morawetz on Private Corporations, 2nd Ed., Vol. I, § 290.
Pomeroy on Equity Jurisprudence 3rd Ed., Vol. 3, § 1092, p. 2116.

In *Old Dominion Copper M. Co.* vs. *Lewisohn et al.*, *supra*, the Circuit Court, by LACOMBE, J., held that there was no fraud, citing *Foster* vs. *Seymour* and *McCracken* vs. *Robison*, *supra*.

In *Foster* vs. *Seymour*, *supra*, WALLACE, J., says (p. 66):

"There was no fraud upon the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there was of the corporation. There were no stockholders, unless they were stockholders. What was done was done by the corporation. By the exchange the corporation got the mining property, and gave it back again to those from whom it got it, divided into 100,000 shares of the nominal value of $100 each (*The Ambrose Lake Tin & Copper Mining Co.* (*Ex parte Taylor*), L. R., 14 Ch. Div., 390; *re Seamless Box Co.*, L. R., 17 Ch. Div., 467)."

In *McCracken* vs. *Robison*, *supra*, the opinion

of the Circuit Court of Appeals, by WALLACE, J., in describing a similar situation, states at page 377:

"While directors in name they were principals in fact."

And later in the opinion condemns the defendants in the case for having built up a theory

"by confounding names with things and forms with substance."

In *Stewart* vs. *St. Louis, etc., R. Co., supra*, the Court, at page 738, says:

"All parties—directors and stockholders—assented to it; and surely, *subsequent purchasers of stock*, or the *corporation* itself, cannot now object to it (1 Mor. Priv. Corp., 290). It is true the vendors got a very large advance on the price they paid, but that is not alone the test by which the *bona fides* of the transaction is to be tried (*Id.*, 293). * * * As before remarked, parties taking stock afterwards in the company cannot complain of the purchase. The records of the company showed the transaction. It was not kept a secret. *There was no law compelling any person or municipality to take stock in the company unless they voluntarily chose to do so; and if they were deceived by the misrepresentations of the officers, their cause of action rests on that deception and not on an attack on the original contract of purchase*" (italics ours).

In re Ambrose, supra, JAMES, L. J., says on page 395:

"In my view the company only gave back in substance that which it was getting, and *the fraud* was *not between the vendors and the company*, the purchasers, but was a thing calculated to delude people into believing that the shares when got were something more valuable than they really were. * * *

What was taken back was the very thing that

was given in exchange for it, calling it by different names and dividing it into different shares" (italics ours).

BRETT, L. J., says, on pages 396–397 :

"The people who were representing this farce did not deceive themselves, nor were the *people supposed to be buying* nor the people supposed to be selling *deceived.* Is there any deception at all? *The whole was done by the same people; there was nobody in the limits of the company who was deceived in the least*" (italics ours).

COTTON, L. J., on page 399, says :

"*The remedy is a remedy of each purchaser of shares, if there were any such, who was deceived by the representations made by his vendor as to the constitution of the company*" (italics ours).

In re British Seamless Pape. Co., supra, follows the rule both in the judgment and in the main body of the opinions. This case is cited by petitioner upon *dicta* in the opinions rendered therein, to the effect that an immediate issue of cash stock *accompanied with a prospectus* would have altered the judgment (pp. 474, 479). The specified requirement of a *prospectus* is significant. Any prospectus *calculated to deceive* subscribers would involve either actual misrepresentation, or concealment tending to create a false impression which would amount to misrepresentation. Such prospectus was necessary to the perpetration of fraud. *The absence of any prospectus in the present case, therefore, excludes fraud.* The case cited thus becomes especially important in establishing the status of the subsequent *subscribers* as *vendees* from the *company vendor without statement* on the part of the vendor *or inquiry* on the part of the vendee.

In *Barr et al.* vs. *N. Y., L. E. & W. R. R. Co.*

et al., supra, the N. Y. Court of Appeals, at page 273, said:

"We may concede that the contract was voidable, as a scheme concocted by the directors for sharing in the profits of construction; but the difficulty is that all the members of the corporation were assenting to it. There was, therefore, in fact, no fraud practiced upon the company. Practically, the promoters of the corporation in this way placed a valuation upon the corporate properties and franchises, which the contribution and expenditure of their money created; and the fact that they were created for an *expenditure less* than *the par value* of the *aggregate issues* of capital stock and bonds does *not affect* the question at all" (italics ours).

In *Seymour* vs. *Spring Forest Cemetery Association et al., supra*, the same Court says, at page 340:

"While the technical form of this transaction was a sale by the eleven to the corporation, its substance was merely a change in the manner of holding. *The sellers were the buyers.* * * * *Whatever the price it wronged no one and could wrong no one.* * * * *No doctrine as to the dealing of a fiduciary agent with the property of his principal has any application to such a transfer as was made*" (italics ours).

In *Blum* vs. *Whitney et al., supra*, the New York Court of Appeals has reiterated the rule, citing the foregoing cases, including the decision of Judge Lacombe in the present case. The action was brought by the plaintiff as a stockholder of the Distilling Company of America, a New Jersey corporation, on behalf of himself and all other stockholders, after the refusal of the company to sue.

The defendants Whitney and others, owners of stock in certain distilling companies known as the "Constituent" companies, formed a syndicate

which, by agreement, was to receive the stock of other shareholders of such "Constituent" companies, and to transfer all the stock together with a sum in cash to be raised by them, to a corporation to be known as the Distilling Company of America, to be organized by the defendants with an *authorized* capital stock of $125,000,000. Of this *authorized* issue, $67,500,000 was to be issued for the stocks of the "Constituent" companies and the cash, leaving $57,500,000 *unissued stock for future* purposes. The defendants organized the Distilling Company of America with the above-mentioned *authorized* capital, themselves becoming its directors and constituting the entire board thereof, transferred the stocks of the "Constituent" companies owned by them or deposited with them together with the required cash, and caused the Distilling Company *to issue* to them in return $77,500,000 of the capital stock of the company, *the entire issued* stock thereof. There remained, therefore, of the authorized issue of the Distilling Company, $47,500,000 *unissued*. The complaint, among other allegations similar to those in the present action, contained a like allegation that the defendants, without the knowledge and consent of the depositing stockholders of the "Constituent" companies, or of the Distilling Company of America, or of its stockholders, *appropriated* to themselves a large amount of the *stock* of the Distilling Company *without paying* any consideration therefor and *without revealing* to anyone *that they intended* to make any profit or that *they did make a profit* in the transaction (Court of Appeals Cases and Points, N. Y. Law Institute Library, 1906, Vol. 2[illegible]4, p. 21, *fol.* 81). The relief asked for was that the defendants account for the secret profit made by them or the proceeds thereof and for general relief. Defendants demurred to the complaint for want of

sufficient cause of action. The opinion of the Court in sustaining the demurrer rests entirely upon the principle followed by Judge Lacombe in the present case, with full discussion and even additional emphasis. *The opinion, at page 242, also refers to the law governing promoters, which it holds has no application.* It is further to be noted that the attention of the Court of Appeals was called to the Massachusetts case *Old Dominion Copper Mining & Smelting Co. against Bigelow.*

N. Y. Court of Appeals Cases and Points, N. Y. Law Institute Library, 1906, Vol. 2304. Case, p. 334. Appellant's Brief, pp. 9, 12, 15, 40, 68. Respondent's Brief, Def'dt Whitney, pp. 40, 43, 99, 102.

II.

The Corporation.

The company was not injured by the exchange on July 11th, 1895, for property duly received, of 130,000 of the 150,000 authorized shares of the capital stock, in the absence of any cash capital or other shares outstanding, either issued, contracted for or offered.

The company was not injured by the subsequent offer for sale on July 18th, 1895, of the remaining 20,000 shares of its authorized capital stock at par for cash, as it duly received and always retained the entire amount, $500,000, in cash, no part ever going to Lewisohn or Bigelow in any form.

THE COMPANY, THEREFORE, SUFFERED NO INJURY.

III.

The Syndicate Associates.

1. Petitioner rests a claim upon the rights of members of the syndicate other than Lewisohn or Bigelow.

The entire stock alleged in the complaint to have been received by the syndicate was 80,000 shares (Record, p. 12, Par. Nineteenth). Of this one-half or 40,000 shares *was bonus* or *profit* (*ibid*). The other half or 40,000 shares was *sold to* syndicate at $25 per share *by Bigelow and Lewisohn*, not by the company (*ibid*), it devolving upon Lewisohn and Bigelow to dispose of enough stock to raise the cash needed to repay the syndicate advances; but Lewisohn and Bigelow gave their associates the chance to purchase this stock with their advances, which privilege they accepted.

Thus the entire stock alleged in the complaint to have been received by the syndicate associates was either received as profit *eo nomine*, or *bought* from Bigelow and Lewisohn, out of their stock, and was not bought from the company.

2. The Massachusetts Court, in the *Bigelow* case, *includes* the members of the syndicate as *stockholders* who were *defrauded*.

Old Dom. M. & S. Co. vs. *Bigelow*,
188 Mass., pp. 326, 328.

The Massachusetts Court says, at page 323, that no disclosure was made to the syndicate. The bill avers participation by the associates in the plan to secure a large profit (p. 4). Disclosure to the syndicate of a profit of 100 per cent. or 40,000 shares, is conceded by the complaint (p. 4, Par. Fourth; p. 9, Par. Nineteenth; p. 12, *fol.* 21).

The bill also states that the syndicate members

themselves participated in *the profits* of the entire sale of property inclusive of the mining claims, the subject of the present suit (Record, p. 4, *fol.* 6 ; p. 14, *fols.* 24, 25).

3. No cause of action in the right of an associate based upon secret profits can arise where the associates *themselves not only shared* but *covenanted to share* in those profits as alleged in the present case (p. 4, *fol.* 6),

"it was understood *and agreed* between the members of said syndicate and said Leonard Lewisohn and Bigelow that * * * *and that the members of said syndicate should receive in cash or in stock of the new corporation to be formed to purchase said property as aforesaid the profit made by such sale to a new corporation pro rata according to their several subscriptions or interests.*"

See p. 12, (*fol.* 21) :

"and said syndicate thereby made a profit of not less than one million ($1,000,000) dollars."

See also p. 14, *fols.* 24, 25, as follows :

"and all of said action was taken * * * to enable said Leonard Lewisohn and said Bigelow *and such persons as they had associated with them to make a large profit* by the sale of said property of the Baltimore Old Dominion Company, *and of said mining claims and real estate* to the complainant corporation."

No complaint can be made on behalf of receivers of the *bonus* or profit stock.

Cook on Corps., 5th Ed., § 730, page 1848, says :

"If the complaining stockholder participated in the act complained of, he, *of course*, is barred of his remedy."

In *Brown* vs. *Duluth, N. & N. Ry. Co.*, 53 Fed. R., 889, NELSON, J., says, page 892:

"He cannot bring suit on behalf of the other stockholders against the corporation or other parties participating in the issue as his own title is tainted with *the same fraud*" (italics ours).

The authorities are innumerable which deny relief to the *holders* of tainted stock.

The Court, in *Arkansas R. L. T. & C. Co.* vs. *Farmers Loan & Trust Co. et al.*, 13 Col., 587, in relation to the equities of a similar class of persons, says (p. 604):

"Counsel for plaintiff in error states in his brief that the court below dismissed the bill because *ex turpi causa non oritur actio*. The maxim was well and aptly applied. The judgment should be affirmed."

4. No cause of action in favor of the syndicate members can be based on stock (the other 40,000 shares) which they bought from Bigelow and Lewisohn, not from the company. The syndicate took this stock subject to all disabilities of Bigelow and Lewisohn.

Brown vs. *Duluth N. & N. R. Co.*, 53 Fed. R., 889, 892.
Kent vs. *Quicksilver Mining Co.*, 78 N. Y., 159, 188.
Parsons vs. *Hays*, 14 Abb. N. C., 419, 433.
Cook on Corps., 5th Ed., § 735, p. 1883.
Petitioner's Brief, p. 49.
188 Mass., 315, 323.

5. THE SYNDICATE STOOD IN THE SAME RELATION TO THE COMPANY AS BIGELOW AND LEWISOHN.

They were all sellers to (themselves) the company.

Blum vs. *Whitney*, 185 N. Y., 232.

The opinion of the N. Y. Court of Appeals, on p. 241, contains the following :

" The stockholders of the constituent companies (syndicate members) and the individual defendants were the *organizers* of the corporation and *became its first stockholders ; they dealt wholly between themselves as sellers and buyers, organizers and corporation ;* no other persons had any interest in this initial transaction ; *if fraud had been practiced by any one of the organizers upon those associated with him, the cause of action would have vested in the party injured*" (italics and bracketed words ours).

We submit that the view taken by the Court in *Blum* vs. *Whitney* is right and the view to be taken in the present case.

The present company, while frequently alleging that the syndicate were ignorant of the profits taken by Bigelow and Lewisohn, does not allege that they would not have bought from Bigelow and Lewisohn if they had had such knowledge. The presumption is to the contrary from the universal acceptance by the syndicate members.

SYNDICATE MEMBERS ARE NOT COMPLAINING.

Years after and *in face* of *practical* construction by *actual* performance and *sharing* in the benefits, *new parties* may not be allowed to come in with *new interpretations*, thus affording opportunity for *speculative suits* intended *to benefit such new parties alone*, and from which the *original parties cannot* by any possibility derive *benefit.*

The allegations, are, therefore, wholly irrelevant, as no cause or claim of the syndicate or of any of its

members could enure to the company; all claims of the members of the syndicate could only be between themselves, on the one hand, and Bigelow and Lewisohn on the other.

THE REMEDY FOR ANY FRAUD UPON THE SYNDICATE ASSOCIATES IS BY SUIT BROUGHT BY THEM INDIVIDUALLY.

Getty vs. *Devlin*, 54 N. Y., 403, followed in *Franey* vs. *Warner*, 96 Wis., 222, 236; *Burbank* vs. *Dennis*, 101 Cal., 90, 102.

Lake Ontario R. R. Co. vs. *Curtis*, 80 N. Y., 222.

Thornton vs. *Wabash Ry. Co.*, 81 N. Y., 462, 467.

M. V. Co. vs. *Bradley*, 181 N. Y., 152.

THE SYNDICATE AGREEMENT AFFORDS NO BASIS OF CLAIM ON THE PART OF THE COMPANY.

This precise question has been settled in important and well considered cases, where similar contracts were involved, the Court holding adversely to the company's title.

Hutchinson vs. *Simpson*, 92 App. Div. N. Y., 382.

Blum vs. *Whitney*, 185 N. Y., 232, 241.

In *Blum* vs. *Whitney* the fraudulent profit was alleged to be $7,750,000 (Ct. of Appeals Cases and Points N. Y. Law Inst. Lib., Vol. 2304, § 19, *fol.* 76). The profit was alleged to result from *turning in less property* than agreed upon and *taking more stock* for one property owned by defendants than properly assignable thereto.

The N. Y. Court of Appeals, in *Blum* vs *Whitney*, and the Appellate Division in *Hutchinson* vs. *Simpson*, both denied *to the company* any right arising from the syndicate contract upon *the common ground*, namely, that there was no relation of *subscribers* to the corporation, the N. Y. Court of Appeals specifically holding that the *law of promoters did not apply to the case* (185 N. Y., 242).

Petitioner offers only a single authority in opposition, *Arnold* vs. *Searing*, 67 A. T. L. Rep., 832. The case cited was a decision by the Vice-Chancellor and related to an obviously different situation. The syndicate members by the agreement had "syndicate shares" entitling them to receive securities of the corporation to be formed in exchange for their investment, not as in the present case repayment in cash from the syndicate managers. Furthermore, the cost of the property to be purchased was fraudulently overstated and the excess was misappropriated. The syndicate members, therefore, were not partners or associates with managers as in the present case, but were parties furnishing the funds with which the properties were to be acquired and expected to take the securities of the company in return. Thus the case was one where the law governing promoters was applicable such as the cases cited *post*, brief, p. 64 (1), p. 65 (3).

Unless the case is thus distinguishable, by reason of its peculiar facts, from the cases of *Blum* vs. *Whitney*, *Hutchinson* vs. *Simpson*, *Getty* vs. *Devlin*, and other cases cited *ante*, it is not to be relied upon as an authority.

So distinguished, the opinion wherein it refers to the effect of the assent of all parties interested is in accord with the Circuit Court of Appeals in the present case.

THE SYNDICATE AGREEMENT WAS WHOLLY BETWEEN THE PARTIES THERETO.

The reference in the complaint (*fol.* 21) to a few instances does not show a dealing by the company with *subscribers*. No authority to the company therefore is alleged. It doubtless was a bookkeeping matter, where the company in offset of moneys due Bigelow and Lewisohn, paid the cash direct on order of the latter. It is not claimed that the paragraph creates any other or different interests than *those* of the *syndicate members*, or that by the allegations in *folio* 21, to the effect that "Lewisohn and said Bigelow caused the complainant corporation to pay such amount in cash from the funds of the complainant corporation," *any new* or *other interest* or relation was created.

IV.

The 20,000 Shares.

1. The offer by the company of the 20,000 shares was not made or even suggested to the public *until after* the company had *acquired* the property from the syndicate in exchange for the 130,000 shares *and had been put in possession* (Record, pp. 8, 9).

2. The subscribers to the 20,000 shares paid their money for the right to *participate* in such assets as the company *possessed at the time* they were *invited* to *subscribe*.

Petitioner in the brief (p. 37 and elsewhere), to confer upon the subscribers the rights of beneficiaries, would postpone the sale of the property to the dateof September 18th, 1895, when the certificates of stock were issued.

For this purpose, petitioner contends that the transaction was not completed when the property was sold and possession delivered, but only when the certificates were finally issued.

The fault of the contention is plain. It does not square with the allegations of the complaint.

On September 18th, 1895, the directors did nothing more than to confer the formal authority upon the officers of the company to prepare and issue the certificates to the *nominees* of Bigelow and Lewisohn.

The complaint shows that prior to that date every substantial step in the transaction had been taken; the offers of the properties had been made in writing; acceptance thereof and the issuance of stock therefor had been voted by the directors; both of these actions took place on July 11th. These alone might be said to have closed the transaction, but they were followed by delivery of possession of all of the property to the company on July 12th (Record, pp. 9 and 10, par. 16). This finally completed the transaction.

Bigelow and Lewisohn then were stockholders of the company to the extent of 130,000 shares under every rule of law or authority pertinent. Certificates were not necessary to their ownership of the shares.

Certificates, as the name implies, are not stock but merely evidence of ownership of shares.

Van Allen vs. *The Assessors*, 3 Wall., 573, 598.
Hubbell vs. *Drexel & Co.*, 11 Fed. Rep., 115, 118.
Cook on Corporations, 5th Ed., § 13, pp. 49, 50.

If the certificates had never been authorized to be issued, the ownership of Bigelow and Lewisohn of

the 130,000 shares would have been full, complete and absolute, and any disposition by them of any or all of the shares would have been valid, carrying with it all the rights of stockholders of 130,000 shares of the company.

Case vs. *Bank*, 100 U. S., 446.
National Bank vs. *Watsontown Bank*, 105 U. S., 217.
Hussey vs. *M. & M. Bank*, 10 Pickering, 414, 422.

The company, on the other hand, was the owner of the properties and entitled to all formal evidences of title.

Ownership had passed, in the property to the company, and in the stock to Bigelow and Lewisohn. No adverse interest could intervene.

Delay in issuing certificates incident to engraving and facilitating both holders, desiring to have the stock issued to their nominees, and the company avoiding subsequent reissue, is usual and almost always occurs.

No cause is assigned in the complaint why any other than the usual situation should exist. The complaint contains no intimation of any reservation of right on the part of either party to the transaction.

Mutual consent of the parties could not have changed the transaction after the company had offered stock to others on July 18th.

The resolution of September referred to in the complaint was the usual authority from the directors to the officers of the company to issue the certificates to the persons designated, and was the *vendors disposition* of the certificates at the time and not the disposition of the company.

Petitioner's contention is inconsistent with complainant's position in the present suit. While pe-

titioner's desire now is evident to include everything occurring from or before May 4th, 1895, the date of the purchase by Lewisohn of the Simpson option, down to September, 1895, as one transaction, complainant, in bringing its suits, sought in the one to rescind and in the other suit to retain and recover profits, thus necessarily separating the transactions. The separate positions deliberately chosen by complainant in bringing separate suits is inconsistent with faith in the lately adopted contention. It was not made before the Circuit Court or before the Circuit Court of Appeals until the filing of Appellant's Brief in reply. It, however, brings out sharply the want of connection between the subscribers and the previous transaction, and consequently the absence of any fiduciary relation.

3. The subscribers' money always remained with the company. No part of it went to Bigelow or Lewisohn in any form.

4. That they received *full value* for their subscription is shown by the statement in the bill that the shares of stock of the company *were at the time and for a long time thereafter* of the fair market value of $25 a share, the price paid by them (Record, p. 11, *fol.* 20) and even *of greater value.*

The statement of value elsewhere given in the complaint is the mere opinion of the pleader and is irrelevant.

Market value of the property in view of its nature can have no relevancy.

In re Cape Breton Co., 29 Ch. D., 795, the Court, per COTTON, J., says (p. 805):

"Here the property is one for which there is no market price."

In *Gamble* vs. *Queens Co. Water Co.*, 123 N. Y., 91, the Court says (p. 104):

"The true question is what is the value to the Company."

In *Lagunas Nitrate Co.* vs. *Lagunas Syndicate*, 1899, 2 Ch., 392, the Court says (p. 410):

"The property, from its nature, was of necessity of a speculative kind. * * * "

And at page 411:

"The proper way of considering the fairness of price and the probability of large profits coming to the Company is to regard the state of things existing at the time the Company bought."

In *Twin Lick Oil Co.* vs. *Marbury*, 91 U. S., 587, the Court says (p. 593):

"That which would to-day sell for $1,000 as its fair value may, by the natural changes of a week of desperate enterprise, in the same time be made to yield that much every day."

It thus appears that from every point of view, the subscribers to the 20,000 shares received full value at the time.

5. The allegations of plan and conspiracy by Lewisohn and Bigelow set forth in the complaint (Record, pp. 3, 4, Paragraphs Third and Fourth), and the subsequent allegation (p. 9, Paragraph Fifteenth) that Lewisohn, and Bigelow, *pursuant to such* original plan and conspiracy, and *for the purpose* of furnishing working capital and funds to the corporation to develop its plants and other properties, caused the company to offer the remaining 20,000 shares of its capital stock, are wholly *irrelevant* and no inference could properly be drawn therefrom by the pleader or the Court, nor did the de-

murrer admit the correctness of any such inferences drawn by the pleader.

In the absence of allegation that *any such purpose* was *communicated* to the subscribers, repeated recitals of the existence of such purpose cannot make out a cause of action.

In *Ambler* vs. *Choteau*, 107 U. S., 586, the rule is stated by Chief Justice WAITE, at page 591, as follows :

"The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity. Until connected with some specific acts for which one person is in law responsible to another, they have no more effect than other words of unpleasant signification. While in this case the offensive words are used often enough, the facts to which they are applied are not such as to make the defendants answerable to the complainant."

See also .

Van Weel vs. *Winston*, 115 U. S., at pp. 237, 238.

St. Louis, &c., Railway Co. vs. *Johnston*, 133 U. S., at page 577.

COURTS OF EQUITY WILL NOT BE ACTIVE IN SEEKING FOR INFERENCES IN AID OF A CLAIM AGAINST AN ESTATE BROUGHT MANY YEARS AFTER THE TRANSACTION AND AFTER THE DEATH OF THE TESTATOR THE PRINCIPAL PARTICIPANT THEREIN.

Every inference against the existence of fraud will be had in favor of parties acting under the advice of counsel of high standing in the community.

6. Taking the allegations of the complaint as they stand, Lewisohn and Bigelow, when they exchanged their property for 130,000 of the shares of

the corporation, took the risk of additional money not being subscribed thereafter to aid the corporation in developing the property. They could not know how much would ever be subscribed for working capital.

AFTER A SINGLE *cash* SHARE HAD BEEN SUBSCRIBED FOR, LEWISOHN AND BIGELOW COULD NOT HAVE *withdrawn* THE *property* FROM THE COMPANY.

When the 20,000 shares of stock were offered for sale all that had gone before was ended and it was of no concern to such subscriber whence the property had been acquired.

At what value, or at what original prices at the various different times in which such properties had been transferred from one to another until finally lodged in the company, were questions with which the subscribers did not concern themselves

7. THE COMPLAINT SPECIFICALLY ALLEGES THAT THE SUBSCRIBERS NEVER RECEIVED ANY INFORMATION (*fols.* 16, 19) AND THERE IS NO ALLEGATION FROM WHICH AN INFERENCE MAY BE FAIRLY DRAWN, THAT ANY INFORMATION WAS EVER OFFERED TO OR SOUGHT BY THEM.

The complaint frequently alleges that Lewisohn and Bigelow *purposed* to provide the company with working capital and *for this purpose* offered the 20,000 shares, but nowhere does the bill state that the subscribers were invited to *provide working capital* or that any statement was made *to them*, or any intimation *received by them* that they were subscribing working capital or contributing to a corporation which had any definite capital or which had issued any stated amount of stock for property. The allegations of intent and conspiracy

of Lewisohn and Bigelow, therefore, being in no way connected with inducements offered or statements made to the subscribers, can, as pointed out by Chief Justice Waite in *Ambler* vs. *Choteau*, *supra*, have no effect in determining such relations.

IT IS NOT ALLEGED THAT THE COMPANY, IN OFFERING THE STOCK, FURNISHED ANY INFORMATION TO THE SUBSCRIBERS RELATING TO THE PROPERTY ACQUIRED OR INFORMED THE SUBSCRIBERS THAT THEY WERE EXPECTED TO PROVIDE WORKING CAPITAL.

For anything that appears in the complaint *the subscribers* may have presumed that the money supplied by them would go in whole or in part at some future time to the acquisition by the company of additional mining properties.

The bill does not state that the subscriptions were based upon anything which had theretofore been done or intended by Lewisohn or Bigelow, whether disclosed or undisclosed.

If this Court shall casually wonder why parties should subscribe to stock in the absence of any *statement*, the answer is that the pleader had in reality an entirely different state of facts to deal with from what is disclosed by the complaint, upon which *real facts*, however, a cause in equity could not have been pretended.

The deficiency of the bill in this respect is not due to the oversight of the pleader, but to the actual absence of such statement.

In other words, the real transaction is not disclosed in the bill.

A fair explanation of the situation is that Bigelow and Lewisohn themselves sold the stock and furnished the money just as they sold 40,000 of *their* shares to the syndicate for $1,000,000. This was the form in which complainant *claimed* that its original bill stood (*ante*, Brief, pp. 5–6).

Even if the complaint alleged, as it does not, that the subscribers were specifically invited to *provide* working capital, it would be insufficient to impute liability in the absence of any proposition to form a company, or any statement of property acquired or of any proposition to acquire property. Courts of equity will not lend their aid to speculative suits based upon an "artificial case" (*Flagler Engraving Machine Co.* vs. *Flagler*, 19 Fed. R., p. 476) by suggesting necessary allegations where the *supposedly injured* parties have long slept on their rights and are not now complaining.

These comments are not intended to have any bearing upon the merits of the case but simply to ascribe to its proper cause the lack of allegation in the bill from which any inference could be drawn to account for the subscriptions to the 20,000 shares of stock, without statement of any kind by the company.

The failure to avail of the ample opportunity afforded by the leave to amend must be taken as conclusive against the pleader.

8. ON THE AVERMENTS OF THE COMPLAINT THE SUBSCRIBERS WERE VENDEES PURCHASING WITHOUT REPRESENTATION OR INDUCEMENT FROM THEIR VENDOR (THE COMPANY).

There was no other relation between the parties, and consequently no foundation for claim of any fiduciary relation.

It is not alleged that the subscribers to the 20,000 shares *had any dealings* with Lewisohn and Bigelow, *but only with the company.*

9. IF ANY LIABILITY AROSE IT COULD ONLY BE ENFORCED BY THE INDIVIDUAL SUBSCRIBERS DEFRAUDED.

For any damage to their rights the subscribers had their *individual remedy, not the company.*

Pomeroy on Eq. Jur., *supra*, says:

"First Class. Directors Guilty of Fraudulent Misrepresentations or Concealments. Where diractors or managing officers issue prospectuses, circulars or reports containing fraudulent misrepresentations or concealments concerning the company's affairs, and persons are induced by these documents to purchase shares of the stock, or to enter into contracts for their purchase, and thereby sustain a loss, such defrauded stockholders may, as has already been shown, either obtain the relief by repayment or rescission against the corporation, or may obtain relief against the fraudulent directors personally by means of an equitable suit for an accounting and repayment of the money, or by an action at law for the deceit. The equitable suits against the directors must plainly be brought *by the stockholders, and not by the corporation, since the wrong is not done to the corporate property or franchises, but consists wholly in a violation of the stockholders' proprietary rights in their shares of stock. Such a suit cannot be maintained by one stockholder suing on behalf of himself and all others similarly situated, the injury is several and individual; each defrauded stockholder must sue for himself*" (italics ours).

See also the distinction drawn by Morawetz on Private Corporations, 2nd Ed., Vol. 1, secs. 291, 292.

See also

Flagler Engraving Machine Co. vs. *Flagler*, 19 Fed. R., 468, 470; C. C. Mass. D.

Langdon vs. *Fogg.*, 18 Fed. R., 5, 8.

V.

THERE WAS NO DAMAGE.

Petitioner practically concedes that the only injury suffered was that the syndicate members and the subscribers did not make as *much profit* as they otherwise might (Petitioner's Brief, pp. 43, 44).

The bill alleges that the stock was worth *par* and *over for a long time after* (Record, p. 11, *fol.* 20. Opinion Circuit Court Appeals p. 31, *fol.* 56).

It is to be noted that the company received its entire property from Bigelow and Lewisohn on July 11th, 1895 (Record, p. 8, Par. 13). For this property 130,000 shares of the company were voted and issued. This property and the $500,000 received for the 20,000 shares, gave, as stated by the complaint, a value of $25 per share to the stock of the company, which continued to have such value *for a long time thereafter.*

Obviously, the properties were conveyed as one transaction, and their valuation must have been then considered and be so now considered. Certainly no other rule could be equitable as against Bigelow and Lewisohn, who were conveying the properties.

The *sum total* of the two properties, as represented by the 130,000 shares capital stock, is alleged by the complaint to have been of the value of or more than $3,250,000 *at the time* and *for a long time thereafter.* If one of the parcels was of less value, the other must have been of greater value than the amount fixed in the offer.

The obvious intention was to combine the properties.

Combination, itself, created a value.

In *Adams Express Co.* vs. *Ohio*, 166 U. S., 185, the Court said (p. 219):

"Wherever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property."

Where the capital stock represented, as in the present case, only shares in the property conveyed, the *conceded value of that stock* correctly represented the value of the property.

In *State R. R. Tax Cases*, 92 U. S., 575, the Court says (p. 605):

"It is therefore obvious that when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, of all its property, its capital stock and its franchises, for these are all represented by the value of its bonded debt and of the shares of its capital stock."

VI.

COMPLAINANT'S CLAIM IS GROSSLY INEQUITABLE.

A similar claim has been considered by the Court of Appeals of Nebraska, and condemned.

Home Fire Ins. Co. vs. *Barber*, 67 Neb., 644 (60 L. R. A., 927).

The Court, in that case, at page 663, said:

"There is another and still stronger reason why the present stockholders *have no standing* in a court of equity to complain of the transactions on which the suit is brought. To permit them to re-

cover, under the circumstances of the case at bar, would be highly inequitable. It would be to give them moneys to which they had no just title or claim whatever and would *enable them to speculate upon wrongs done to others with which they have no concern.* It would enable them to recover back a large part of the purchase money they paid and agreed to pay for the stock, notwithstanding they obtained and now retain all that they bartained for."

Under the rule stated in Pomeroy, *supra*, if subscribers to the 20,000 shares were entitled to any relief, it would be limited either to a rescission and payment for 20,000 shares of stock of the company or to the damages sustained by the holders of the said 20,000 shares of stock, and would not extend, as is sought by the present bill, to a rescission or payment for 30,000 *other* shares of stock. Obviously, there were *no other subscribers* except those subscribing to the 20,000 shares, as all the rest of the capital stock was sold to Bigelow and Lewisohn themselves. If any liability arises by reason of the company, through the control of Bigelow and Lewisohn, failing to disclose to the prospective purchasers of the 20,000 shares the actual cost to Bigelow and Lewisohn of the properties then held by the company and for which the 130,000 shares had been exchanged, it is a liability to *such of the purchasers* of the 20,000 shares as see fit to enforce their rights and *to the extent* to which *they could establish their damage* in case they elected to retain their stock and affirm the transaction. In the present suit *together with the suit brought upon the 100,000 shares* (Record, p. 17, Par. Twenty-sixth, *fol.* 29) it is sought to extend this right to the company itself and *to multiply* the liability *six fold* for the benefit of the holders not only of the 20,000 shares, but *of the entire* 150,000 shares of the capital stock of the com-

pany *including the profiting syndicate associates.* Thus Lewisohn and Bigelow are to be made to pay *again* to their syndicate associates or *their vendees* the 100 per cent. (30,000 shares), *profit already received.*

The Court, in *Home Fire Ins. Co.* vs. *Barber*, *supra*, at page 664, says :

"Recovery by or for the benefit of the present stockholders means, to put it plainly, that through the instrumentality of a court of equity, they are to get shares, worth by their own valuation $115 each for $55 each ; are to get back dividends which never would have been payable to them in any event and were not bargained for when they bought, and are to receive in addition to the shares worth $1.15 on the dollar 60 cents more on each dollar, imposed on Barber for his delinquencies. Barber wronged the old stockholders, his conduct in many respects was unconscionable and indefensible, but his fellow stockholders were supine for many years. They took no steps to investigate what he was doing or to protect or assert their rights. Now third parties, who bought all of Barber's shares, including those which he held as a result of his wrongful manipulation, seek to assert those rights and reap a profit thereby. *Because the inequitable conduct of Barber shocks the conscience of a chancellor is no reason why he should give his conscience a further shock by allowing Funkhouser and his associates to recover money to which they have no legal or equitable claim*" (italic ours).

The complaint avers (Record, p. 11, *fols.* 19, 20) that the capital stock of the company was at the time and *for a long time thereafter* of the *fair market value* of $25 per share, thus making the value of the property and cash subscribed equal to $3,750,000.

The company seeks to recover profits of $2,250,000 (p. 12) plus over twelve years' interest ($1,620,000), making a total recovery of over $3,870,000, which added to the above value of the property amounts

to $7,620,000, resulting in a value of over $50 per share.

Lewisohn and Bigelow's share in the syndicate (Record, p. 12, *fol.* 21) is alleged to have been 20,000 shares, one-half of which was profit. The remaining members of the syndicate are alleged to have had 60,000 shares, *one-half* of which was *profit*. Then the syndicate, other than Lewisohn or Bigelow, got 30,000 shares at $25 a share and 30,000 shares for nothing, averaging $12.50 per share for the whole 60,000 shares. In this way the holders of 20,000 shares valued in the complaint at $25 and for which was paid $25 per share would now hold the same shares at a valuation of $50 per share or double what was paid and the holders of 60,000 shares for which $12.50 was paid would now hold the same at $50 per share or quadruple what was paid.

The iniquity of the claim in the present case is certainly as great as that condemned by the Nebraska Court above quoted.

THE CORPORATION IS BEING USED TO OBVIATE THE WANT OF EQUITY IN THE STOCKHOLDERS.

As stockholders they would be unable to meet the requirements of Equity Rule 94 as to time of ownership of stock.

Home Fire Ins. Co., 67 Neb., pp. 657, 658.

Dimpfell vs. *Ohio & Mississippi R. Co.*, 110 U. S., 209, 211.

The corporation may not be used to work an injustice.

Seymour vs. *Spring Forest C. Assoc.*, 144 N. Y., 333, 340.

United States vs. *Milwaukee Refrigerator Transit Co.*, 142 Fed. R., 247, 254.

Bank vs. *Tubein*, 59 Ohio St., 316, 52 N. E., 834.
In re Rieger Kapner & Altmark, 157 Fed. R., 609.

VII.

THE SUBSCRIBERS ARE NOT COMPLAINING.

They have acquiesced. There is no allegation in the bill that they would not have subscribed had they known of the alleged profits.

New parties coming in long after, cannot substitute their construction or inferences as to what the subscribers themselves would or would not have done.

In *Flagler Engraving Machine Co.* vs. *Flagler*, 19 Fed. R., 468, C. C. Mass. D., the Court, LOWELL, J., says (p. 476):

"The purchasers, *some or all of them*, may have a right to set aside the sales, and to recover their money of the company or the defendants, or both, but they are necessary parties to the suit or suits, and they *cannot, by obtaining control* of the company, *set up an artificial case* and recover *through the company* what is really *their own loss*, from which the company *itself was enriched*" (italics ours).

VIII.

The Massachusetts Case.

Old Dominion Copper Mining & Smelting Co. vs. *Bigelow*, 188 Mass., 315.

The Massachusetts Court rests its decision in favor of the company upon a cause of action for damages

as for a tort of Bigelow as a director of the company in selling the property to the company without disclosing the cost thereof to him, and thus the Court held, contrary to the doctrine of the cases above cited, that there was fraud in the transaction and a violation of the duty owed by the director to an existing beneficiary with whom such director stood in fiduciary relations. The opinion, speaking of Bigelow and Lewisohn (p. 322), contains the following :

"On the other hand, if they elected to make a sale of it to one standing to them in a fiduciary relation, they were under an obligation to make a full disclosure to the beneficiary of all the facts known to them material to the property and the purchase, or see to it that the fiduciary had adequate independent advice. That is an obligation resting upon every fiduciary, who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que trust*, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself."

The opinion further refers (p. 324) to the decision of Judge Lacombe in the present case on the original bill, and to *Foster* vs. *Seymour* and *McCracken* vs. *Robison*, holding that the doctrine of those cases is inapplicable to the present case, first, because in the case of *Foster* vs. *Seymour* the bill did not seek to set aside the purchase for a failure to disclose a material fact in selling the property ; second, because the entire stock of the corporations in those cases was issued to the defendant, while, as claimed by the Massachusetts Court, such was not the fact in the *Bigelow* case.

In portions of the opinion there is some confusion as to whether *Bigelow* was liable as promoter or simply as trustee for a tort.

For example, the opinion almost at the beginning states (p. 320):

"It is clear that on the facts stated the defendant was a promoter of the plaintiff corporation."

The opinion distinctly states and at full length (p. 321) that Bigelow was not liable on the ground that the plaintiff corporation was entitled to the benefit of the original purchase, as a beneficiary is entitled where the property was bought for and resold to the beneficiary, at a profit, and that Bigelow was not liable as a promoter for secret profits, because he and Lewisohn had bought the property at a time when they were under no obligation to purchase it for the plaintiff company, and also states further along on same page:

"The fact that the property was bought with a view of reselling it to a corporation to be organized for the purpose, and that that purpose was ultimately carried into effect, does not give to the corporation subsequently organized in execution of the original purpose a right to the benefit of the purchase."

Well-known cases on this point are cited in this connection, and the Court expresses its concurrence therewith.

The opinion on page 322 declares that the rule in *Hayward* vs. *Leeson*, 176 Mass., 310, an earlier case before the same Court, had been adopted upon the ground of failure by the trustee in the sale to his beneficiary to disclose the cost of the property.

On page 326 the opinion, again referring to *Hayward* vs. *Leeson*, stated that the recovery in that case was for secret profits made by the promoters, and on page 327, that the rule in *Hayward* vs. *Leeson* applied to the present case.

Again, the opinion (last paragraph, p. 327) says :

"On the case stated in this bill the defendant was a promoter of the plaintiff corporation ; being a promoter he stood in a fiduciary relation to it," etc.

The Massachusetts Court, however, in considering the relief to which the company is entitled, does not award rescission or secret profits, which could be granted in a proper case either against trustees or promoters, but awards a relief, which in no case has been allowed against promoters or trustees *in the absence of false representations*, namely, *damages* for a tort.

In this respect the Massachusetts Court is in direct conflict with the highest courts of England and of the State of New Jersey.

In *New Sombrero Phosphate Co.* vs. *Erlanger*, 5 Ch. Div., 72, 83, the relief was specifically restricted to rescission.

In *Loudenslager* vs *Woodbury Heights Land Co.* (1899), 58 N. J. Eq. (13 Dick.), 556, 560, the recovery was restricted to the profit received.

The two cases last above cited while affording no support to the Massachusetts decision on the question of liability hold directly against the Massachusetts case as to the relief to be granted where liability exists.

In this connection it is to be noted that petitioner differs with the Massachusetts Court on the question of the proper relief by assigning error of the Circuit Court of Appeals in not granting an account of profits (Brief, p. 14, Fourth Specification).

The liability of Lewisohn and Bigelow as promoters will be considered later in this brief under the Second Point, at page 64 (*post*).

The theory deducible from the opinion in the Massachusetts case would seem to be as follows :

Bigelow and Lewisohn were, as to the holders of 96,000 shares, liable as promoters, the holders of the 96,000 shares being made up by the Court as follows (p. 323): To the syndicate associates were allotted 80,000 shares of the 100,000 shares issued by the company for the property of the Baltimore Company, 20,000 of such 100,000 shares having been retained by Lewisohn and Bigelow as a profit. From the 80,000 shares thus allotted to the syndicate there is to be deducted 4,000 shares received by Bigelow as a member of the syndicate, leaving 76,000 shares allotted to the members of the syndicate other than *Lewisohn* and Bigelow. The 20,000 shares issued to the subscribers for working capital added to the holdings of the syndicate members other than Lewisohn and Bigelow make the total sum as enumerated by the Massachusetts Court, of 96,000 shares. Liability as promoters is imposed upon Bigelow and Lewisohn for an *imputed* invitation by them to *intending subscribers* of those 96,000 shares *to become* stockholders in a corporation *thereafter to be formed* to acquire property, without any disclosure of an intended profit by Lewisohn and Bigelow in the transaction.

The opinion further assumes that Bigelow and Lewisohn as such promoters in failing to disclose their intended profit were liable jointly not only to rescission in a proper case at the company's election, or jointly for the secret profits made by them, but separately for damages *in solido* as tort feasors, the damages to be based upon the difference between the actual value of the property and the amount of stock received.

The Massachusetts Court was in error in assigning to the *syndicate members* the relation of beneficiaries to promoters. The Court evidently regarded such syndicate members as beneficiaries invited to subscribe to shares of the corporation to be formed,

and to acquire property owned or to be obtained by Bigelow and Lewisohn in total ignorance of *any profit* to be taken, and has applied in favor of Bigelow's associates the well settled principles of equity as to the rights of such beneficiaries and the liabilities of such promoters to the company. That such view was taken by the Massachusetts Court of the relations between the syndicate associates on the one hand, and Bigelow and Lewisohn on the other, and has controlled its decision is evident from the following language of the opinion (p. 322):

"In the second place the defendant contends that the corporation cannot complain because the facts were known * * * to the holders of all shares of capital stock of the corporation outstanding when the contract of purchase here in question was made, and because the purchase was acquiesced in by them. * * * On the allegations of the bill the defendant and Lewisohn are to be treated as the owners of all the shares then outstanding, and therefore the transaction is taken to have been known and acquiesced in by all the then stockholders.

It is proper to pause here and see just what this contention means."

The opinion then proceeds (p. 323) to state its construction of the statement of facts contained in the bill.

"When this contract was made on July 11, 1895, the authorized capital stock had just been increased from forty shares to one hundred and fifty thousand shares of $25 each, that is to say, from $1,000 to $3,750,000. Of the authorized capital stock only forty shares, or $1,000 had then been issued. As we have said, these forty shares are to be treated on the allegations of the bill as the property of the defendant and Lewisohn. The scheme of the defendant and Lewisohn as to this capital stock of $3,750,000, divided into one hundred and fifty thousand shares, was to issue eighty thousand shares (or $2,-

000,000) to the syndicate, or sell them to the public for cash to provide $2,000,000 to be paid to the syndicate; twenty thousand shares (or $500,000) to themselves for their services and expenses as promoters; twenty thousand shares (or $500,000) to the public for cash for working capital; and the balance, thirty thousand shares (or $750,000) to themselves for the real estate here in question. And this scheme was carried out. In carrying it out *no disclosure* was made to the *persons* who took *the syndicate's eighty thousand* shares (except those of the eighty thousand issued to the defendant and Lewisohn as members of the syndicate), nor to those who took the twenty thousand shares sold to the public for cash for working capital. Of the eighty thousand issued to or for the syndicate it is alleged that the defendant received four thousand. It is not alleged that any of this eighty thousand were issued to Lewisohn. The contention is that inasmuch as the defendant and Lewisohn owned all the forty shares of the corporation, amounting to $1,000, outstanding when the sale here in question was made by them to the corporation, the corporation is barred from complaining that a full disclosure of the material facts was not made by them to it" (italics ours).

The Court then proceeds to discuss the decision of Judge Lacombe in the present case and of the Court in *Foster* vs. *Seymour et seq.*

THE ALLEGATIONS OF THE BILL DO NOT PERMIT THE CONSTRUCTION ADOPTED BY THE MASSACHUSETTS COURT.

Of the 80,000 syndicate shares, not only the 4,000 of Bigelow's as syndicate member, but over 16,000 of Lewisohn's as such member must be deducted as chargeable with notice of all profit taken (Record, *fol.* 21). Then 30,000 more shares, (syndicate shares) the *bonus*

or profit stock (Record, p. 12, Par. Nineteenth), must also be deducted as chargeable with notice of being *wholly profit*. Finally the remaining 30,000 shares *purchased* (Record, p. 12, Par. Nineteenth) by the syndicate members from Bigelow and Lewisohn are chargeable with all the knowledge of the latter (Brief, *ante* p. 22 and Petitioner's Brief, p. 49).

Thus there is left of the 96,000 shares mentioned by the Court only the 20,000 shares subsequently offered by the company for cash to the subscribers without inducement on the one part or injury sustained on the other part.

The construction of Judge Lacombe is the only fair construction, which was to the effect that the entire 130,000 shares, including the 80,000 shares allotted by Bigelow and Lewisohn to the syndicate, were paid to Bigelow and Lewisohn for the property of the old Baltimore Company and issued to them or for their account and at their direction (Record, p. 8, *fols.* 14, 15, p. 10, *fol.* 17).

The only statement in the complaint that any stock was issued to persons other than to Bigelow and Lewisohn and their associates, is made with reference to the last 20,000 shares issued (p. 10, *fol.* 17). Furthermore, the statement of the complaint in describing the syndicate agreement (p. 3, *fols.* 6–7, p. 13, *fols.* 23–25), shows beyond question that not only was the stock to be issued to Bigelow and Lewisohn and by them divided amongst themselves and their associates, *but that profits were contemplated*, and that not Lewisohn and Bigelow alone but *all the members of the syndicate would profit at the expense of the corporation*. The complaint and the opinion in the Massachusetts case are therefore in conflict on the subject of disclosure to the syndicate members of a contemplated profit.

The syndicate agreement being between associates, *all of whom were contemplating a profit*

in the sale to the corporation, if Bigelow and Lewisohn were promoters, their *associate* syndicate subscribers *were equally promoters* and can in no sense be considered as *their own beneficiaries.* The syndicate agreement was intended by all parties thereto merely to provide *in part* means for acquiring property to be *sold thereafter* to a corporation *at a profit*, and the rate of profit to the syndicate members is stated in the complaint. So long as each syndicate member received the *pro rata* profit stated and his money back, it was immaterial to him who received the balance of the 130,000 shares of stock issued for the property. If any of the associates failed to receive his due he had a cause of action against Bigelow and Lewisohn.

So far as appears, Bigelow and Lewisohn carried out their agreement *to the satisfaction* of their associates.

NO ASSOCIATES HAVE BEEN FOUND TO COMPLAIN.

Under the circumstances, therefore, the corporation has no claim. Like agreements and like claims of right on the part of the corporation have been before the courts in other cases and the company held to be without cause of action (Brief, *Ante*, p. 23).

The Massachussets Court treats the holders of 96,000 shares as if they were parties invited by Lewisohn and Bigelow to *subscribe* to the stock of the company *to be formed* to acquire property from Lewisohn and Bigelow without disclosure of an intended profit by Lewisohn and Bigelow. The error of the Court in so considering the relation of the syndicate members to the transaction is clear and has been in detail above referred to.

The error of the Court in so treating the subscribers to the 20,000 shares is also clear.

The Court, in fixing the rights and relations of the holders of the 96,000 shares of stock, places great stress upon *an alleged plan* of Bigelow and Lewisohn at the outset *to cause the company ultimately to issue such shares in the manner set forth.* In fact, the Massachusetts Court relies solely upon this alleged plan of future action to give the character and relation to the holders of the 96,000 shares. No other ground for endowing those holders with the character, relations and rights allowed to them by the Court is even hinted at in the opinion.

NO PLAN OF ORGANIZATION WAS EVER SUGGESTED TO THE SUBSCRIBERS FOR THE 20,000 SHARES (*fols.* 16, 19) AND THE BILL OF COMPLAINT CONTAINS NO ALLEGATION NOR CAN ANY INFERENCE ARISE FROM ANY OF THE ALLEGATIONS THEREIN TO THE EFFECT THAT ANY INFORMATION AS TO PROPERTY OF ANY KIND WAS EVER IN ANY WAY COMMUNICATED TO SUCH SUBSCRIBERS.

In this connection the Massachusetts opinion states at the bottom of page 320 as follows :

"It is not alleged here that the defendant made any misrepresentation as to the price paid by himself and Lewisohn for the property resold to the plaintiff at an advance, as was the case in *Gluckstein* vs. *Barnes* (1900), A. C., 240 ; S. C. below, *sub nominee ; In re Olympia* (1898), 2 Ch., 153 ; *Hichings* vs. *Congreve*, 4 Sim., 420. Where one standing in a fiduciary relation makes such a misrepresentation it may well be that the purchaser can keep the property and force the vendor to make good the representation by paying to him, the purchaser, the difference between what was in fact paid by the vendor and what he represented that he paid for it."

Therefore, so far as those subscribers were concerned, it was immaterial and afforded no ground of right in them that Lewisohn and Bigelow had ever formed the alleged plan of issuing 20,000 shares for working capital. So far as disclosed by the bill, the subscribers to the last 20,000 shares issued were in the same position as if no plan had ever been previously formed by Bigelow and Lewisohn, or in fact in the same position as they would have been if Bigelow and Lewisohn had neither formed such a plan nor continued to be in any way connected with the company after the transfer by them of the property thereto. The materiality of the existence of such plan in any case would be contingent upon statements made to the subscribers of the 20,000 shares before the corporation was formed, or before the subscriptions were made, and as an inducement to such subscription.

EXCEPT AS AN INDUCING CAUSE FOR THE SUBSCRIPTION, ANY PLAN OF ORGANIZATION COULD HAVE NO EFFECT UPON THE TRANSACTION, AND UNLESS COMMUNICATED TO THE SUBSCRIBER NO PLAN COULD BE AN INDUCING CAUSE FOR HIS SUBSCRIPTION.

Statement of a plan and concealment of the intended profit were both essential to create any liability. Without statement of any plan, mere failure to disclose the intended profit afforded *no inducement* and created no liability.

THERE WAS NO FIDUCIARY RELATION BETWEEN THE PARTIES.

There was no basis for any fiduciary relation.

The subscribers' money was not used either in purchasing property or in reimbursing the so-called promoters.

NO STATEMENT WAS MADE OR PROSPECTUS ISSUED.

On the allegations of the bill, the subscribers were simply vendees, to whom the vendor (the company or the directors) owed no other duty than to answer fairly, if at all, any questions asked.

NO QUESTIONS WERE ASKED.

We have seen above that the Massachusetts Court confused the relation between Bigelow and Lewisohn on the one hand and the syndicate members on the other by applying the law governing promoters to that relation, a confusion recently noted by the New York Court of Appeals (*Blum* vs. *Whitney*, 185 N. Y., 232, at p. 242).

This manifest confusion undoubtedly extended to the relation of the subscribers.

The Massachusetts Court further erred in failing ing to construe the bill as one for *rescission*, and in granting relief for damages as for a tort, the rule having been elsewhere unanimously laid down that where the vendee sells property acquired in his own right without disclosing an intended profit the beneficiary in the absence of misrepresentation by the vendor, may rescind, but may not affirm the transaction and ask for damages (see Third Point, p. 76, *post*, Brief).

In the *Bigelow* case the opinion of the Massachusetts Court on page 323, while holding directly contrary to the ruling of the Circuit Court on the hearing of the present case, and to the rule of *Foster* vs. *Seymour*, and other cases contains the suggestion (p. 324) that it does not appear that the bill of complaint in the case of *Foster* vs. *Seymour* contained an allegation of failure by the vendors to disclose the cost of the properties transferred.

Such allegation would have been either super-

fluous or implied where *all the parties were cognizant of all the facts.*

To have alleged that the defendants did not disclose to themselves would have been as unnecessary as it was superfluous.

No cause can be predicated upon an allegation of a failure to disclose *what all the parties interested knew.*

> Am. & Eng. Ency. of Law, 2nd Ed., Vol. XIV, p. 113, subd. 5, and authorities cited.

That the distinction raised by the Massachusetts Court in commenting upon *Foster* vs. *Seymour* is without basis, appears from the subsequent decision of the New York Court of Appeals in *Blum* vs. *Whitney*, where the complaint contained distinct allegations of failure by the vendors to disclose the cost of the properties transferred, and yet the Court applied the same rule.

> Court of Appeals Cases and Points, 1906, N. Y. Law Institute Library, Vol. 2304, *fols.* 50, 78, 79, 81, 82.

The opinion in the *Bigelow* case after referring to *Foster* vs. *Seymour* and *McCracken* vs. *Robison*, states (p. 325) as follows:

"It is hardly necessary to point out the difference between such a case, where the scheme of the corporate organization does not contemplate there being any stockholders other than those who buy the stock issued in the transaction complained of, and a case like that now before us, *where ninety-six thousand* out of one hundred and fifty thousand shares are to be issued to persons to whom no disclosure was made" (italics ours).

Again (p. 326) the opinion states:

"The case submitted to us for decision here by the defendant's demurrer to this bill is a case where

(disregarding the forty shares subscribed for to organize the corporation) the whole capital stock was one hundred and fifty thousand shares, of which fifty-four thousand shares were to be issued to the promoters for services for the sale of the land here in question, *and the remaining ninety-six thousand* were to be issued to persons to whom the facts of this sale were not disclosed" (italics ours).

Also (p. 327):

"Again the corporation is not barred because when the agreement was made it acquiesced in the trade and it was then, from a legal point of view, fully born. That was equally true in *Hayward* vs. *Leeson* and the cases cited in that case. The answer to that suggestion is that *from a business point* of view *the agreement* was not made to bind the corporation with a capital of *$1,000, which was the corporation then in fact in existence*, but to bind the corporation with a capital of $3,750,000. It was to that corporation with a capital of $3,750,000 that a full disclosure ought to have been made, and to that corporation no disclosure was made" (italics ours).

Thus the Massachusetts Court repeatedly rests its decision upon its construction of the relation of the *syndicate members* to Bigelow and Lewisohn.

We have seen (*ante* Brief, p. 18) that the corporation as a legal entity was not injured.

In Equity the Corporation Assented.

Lewisohn and Bigelow were in equity the corporation itself.

As stated by the Circuit Court of Appeals (Record, p. 31):

"A corporation can only act through the human

beings who comprise it, it cannot be deceived or defrauded unless its stockholders and directors are defrauded."

In *Tompkins* vs. *Sperry Jones*, 96 Md., 560, the Court says at p. 583 :

" They at the time held all of its stock and were the sole owners of the company. They were in equity the company itself" (*Swift* vs. *Smith, Dixon & Co.*, 65 Md., 428).

In *Arkansas River Land, &c., Co.* vs *Farmers L. & T. Co.*, 13 Colo., 587, the Court says, at page 598:

" It is clear, therefore, that a body corporate cannot maintain a suit for equitable relief, except as the representative of the stockholders. It necessarily follows that if the shareholders are without equity they cannot, through the corporate organization, or in its name, obtain relief either for themselves or for the corporation."

In *Home Fire Ins. Co.* vs. *Barber*, 67 Neb., 644, the Court says, at page 665:

" * * * If a court of equity could not look behind the corporation to the shareholders, who are the real and substantial beneficiaries, and ascertain whether these ultimate beneficiaries of the relief it is asked to grant have any standing to demand it, the maxim that equity looks to the substance and not the form would be very much limited in its application.

Nowhere is it more necessary for courts of equity to adhere steadfastly to this maxim, and avoid the danger of allowing their remedies to be abused, by penetrating all legal fictions and disguises, than in the complex relations growing out of corporate affairs. Accordingly court and text writers have been in entire agreement that equity *will look behind the corporate entity* and consider who are the real and substantial parties in interest, whenever it becomes necessary to do so and promote justice or *obviate inequitable* results " (italic ours).

EQUITY ONLY REQUIRES THE CONSCIOUS ASSENT OF ALL EXISTING INTERESTS IN THE CORPORATION.

The assent relied upon by the Court in *Foster* vs. *Seymour*, *Parsons* vs. *Hayes*, *Blum* vs. *Whitney*, and like cases, was not a statutory or technical assent, as required by the Massachusetts Court. It was not even the assent of the *corporation*, as required by the Massachusetts Court, but the assent of all the existing interests in the corporation. It was an assent in substance and not in form.

Where all the existing interests are satisfied, equity neither regards the fictional entity of the corporation nor is concerned with its technical assent.

THE ASSENT REQUIRED IS OF THE CORPORATION AS IT EXISTED, NOT THE CORPORATION AS IT MAY *afterward* EXIST.

The assent required was one which would bind the corporation as it existed with 130,000 shares. No other corporation then existed. No corporation then existed with a capital of $3,750,000. There was no such corporation. *A corporation is not a corporation of any stated amount of capital until all such stated amount has been paid in or subscribed.* It is of no relevancy that the company, by its articles of incorporation, was *authorized* to have a capital *stock* of $3,750,000; the company did not thereby become a corporation with that amount of *capital.* It could only become such corporation after the issue of such amount of stock or subscription of that amount of capital. The requirement of the Massachusetts Court, therefore, rests upon technicality and not upon substance. The technical view was taken as of the corporation with its entire authorized stock, which was not in existence at the

time of the transaction and which might never have come into existence.

COURTS DISREGARD THE NOTION OF THE LEGAL ENTITY OF A CORPORATION WHEN PUT FORWARD EITHER TO PROTECT FRAUD OR TO WORK AN INJUSTICE.

United States vs. *Milwaukee Refrigerator Transit Co.*, 142 Fed. R., 247, 254, 255 (citing cases).

The disclosure called for by the Court in the Massachusetts case could in fact never have been made. There was not at the time a corporation with a capital of $3,750,000, and therefore no disclosure could have been made to such a corporation, nor does equity, as administered by the courts in *Foster* vs. *Seymour*, *Parsons* vs. *Hayes*, *Hutchinson* vs. *Simpson* and *Blum* vs. *Whitney*, require such disclosure. It was sufficient, and all that was required or could be required, was that that disclosure should be made to all the existing interests of the corporation.

In answer to the distinction made by the Massachusetts Court between the case then before it and the earlier cases of *Foster* vs. *Seymour*, etc., to the effect that in the *Bigelow* case all the stock issued at the time of the offer, was $1,000, it is only to be borne in mind that in those cases the qualifying shares held by the directors was not the only stock considered, *but the entire amount of stock issued as the result of the transaction.* In answer to the further distinction made by the Massachusetts Court that the existing issue in the *Bigelow* case was only $1,000, whereas *from a business point of view* the agreement was to bind the corporation with a capital of $3,750,000, the total authorized capital stock, it is to be noted as before that the Court in *Foster* vs. *Seymour* and like cases was not con-

trolled by the fact that the total *authorized* issue of the company was issued to the vendors, but that the *entire issued* stock, including that issued in the transaction was issued to the vendors. The Court in those cases places its decision specifically upon the ground that the *entire issued* capital stock was issued to the vendors, not that the entire *authorized* capital stock was so issued.

There can be no reason for the distinction made in the opinion in the Massachusetts case, but that there may be no doubt on the point we refer, in this connection, to the recent case of *Blum* vs. *Whitney, supra*, where the New York Court of Appeals applied the same rule, citing the cases, and where the precise situation existed, namely, an issue to the vendors of the *entire issued stock*, but *not of the entire authorized* stock, there *remaining unissued* a large amount, namely, $47,500,000 of unissued stock of the Distillery Company of America, out of $125,000,000, its total authorized capital stock.

The true criterion in such cases therefore is whether the *entire issued* stock of the company, including *not only the qualifying* shares of the officers and directors, and *those already held* by the vendors, but *also the stock to be issued in the transaction*, was issued to the vendors, and not whether any remainder of the authorized issue by plan or intention may be thereafter offered to other parties.

The Massachusetts Court does not intimate, nor can it be properly contended, that the potential right of the company to issue the last 20,000 shares of its authorized capital of 150,000 shares constituted any difference or ground for distinguishing the rule of *Foster* vs. *Seymour et seq.*

THERE IS NO GROUND FOR SUCH DISTINCTION IN REASON.

A corporation may, as in fact the complainant did (Record, p. 7), by the vote of its directors increase its capital stock, so that the rule of *Foster* vs. *Seymour*, *Parsons* vs *Hayes*, and other cases, was not applied to corporations beyond the possibility of such subsequent increase of capital stock and power to issue the same.

Both on reason and authority the distinction contended for on behalf of complainant in the present case must be considered as unsound.

THE MASSACHUSETTS COURT IN THE BIGELOW CASE DID NOT RELY UPON SUCH DISTINCTION.

The Massachusetts Court was evidently controlled, as we have seen above, by *its construction* of the *rights* of the *syndicate members*, and its view that such *syndicate members* were *existing beneficiaries* at the time of the sale to the corporation of the properties.

The opinion contains no reference to any difference between the situation existing *after* the issue of the 130,000 shares and *before* the issue of the remaining 20,000, shares, the Court relying, as we have seen, upon its view of the rights of the syndicate members, other than Bigelow to whom were issued 76,000 shares of the first 100,000 shares issued.

VI.

Other Cases Cited by Petitioner.

None of the cases cited upon petitioner's brief in support of its contention are applicable to the present case.

None of them present a transaction wherein the vendors dealt entirely with themselves and constituted the entire existing interest in the company, or had independently acquired the property and sold to the company for stock *without prospectus or statement* to subscribers.

From all the cases cited by petitioner as imposing liability on promoters the rule to be deduced is that before any liability arises either

1. Such promoter must have purchased the property with the funds of the company ;

2. Having previously purchased the property with his own funds, must have reimbursed himself from the funds of the company subscribed by others through his inducement.

Erlanger vs. *New Sombrero Phosphate Co. and others*, 3 Appeal Cases, 1218, 1235, and other cases cited *Post* brief, pp. 64, 65 ;

or

3. Have issued a prospectus containing inducements, false representations or concealments which tend to create a false impression and which amount to misrepresentation.

Gluckstein vs. *Barnes* (1900), A. C., 240.

Yeiser vs. *United States Board & Paper Co.*, 107 Fed. R., 340–347, and other cases.

Where none of these conditions exist, there is no liability, there being no basis for any fiduciary relation.

THE CASES CITED BY PETITIONER HAVE BEEN CONSIDERED IN RECENT CASES IN SUPPORT OF LIKE CONTENTIONS AND HELD INAPPLICABLE.

Blum vs. *Whitney, supra;* see Appellant's brief, New York Court of Appeals Cases and Points, N. Y. Law Institute Library, Vol. 2304, Case pp. 10, 12, 14, 17, 25, 62, 67, 68.

Hutchinson vs. *Simpson*, 92 App. Div., 382; see dissenting opinion of Hatch, J., p. 407.

In *Yeiser* vs. *United States Card & Paper Company*, 197 Fed. Rep., 340, decided by the Sixth Circuit and relied upon by appellant as conflicting with the decision herein, the defendants held an *option* for the purchase of manufacturing property for $75,000, formed a corporation and offered to sell to it the property for $100,000 in cash, issuing a misleading prospectus to subscribers to its stock by which the latter were led to believe that the property cost the defendants $100,000, and subsequently paying themselves the $100,000 furnished by the subscribers.

The defendants in that case were liable both as promoters, taking the money of the corporation obtained from subscribers to the stock to purchase the property and on account of the false prospectus under the rule of *Gluckstein* vs. *Barnes* (1900 A. C., 240). *The relief granted* was damages, the *same relief* as in *Gluckstein* vs. *Barnes, supra.*

In the Massachusetts case the Court rejects the promoters' liability cases, relying upon a single case, a previous decision (*Hayward* vs. *Leeson*, 176 Mass., 310), as applicable to the present situation. In *Hayward* vs. *Leeson* the facts presented a different situation. The corporation was insolvent and *the suit was by a receiver.* The properties of the East Tennessee Land Co., when its stock was offered to subscribers, had not been acquired or paid for except in part. Mere options therefor

had been granted. The money received from the subscribers was to be applied to the completion of the purchase. The Massachusetts Court in the *Bigelow* case, at pages 326, 327, *confirms these facts and concedes the difference.*

Furthermore, in *Hayward* vs. *Leeson*, there was a *false prospectus* the opinion of the Court in dealing with the question of fraud refers on two separate occasions to this prospectus, quoting its alluring statements.

On page 313 of the opinion the Court says :

" In this *prospectus* it is stated, among other things, that: 'The capital stock of this company represents actual value without inflation, but does not approximate the entire value of the properties on which it is based. It was the intention of the projectors and incorporators to shape this enterprise so that its stock should *be as solid* as that of a *national bank.* Over half a million dollars of its capital was subscribed before the company's organization, at par. Subscriptions for the remainder are now solicited.' And *no other reference was made* to the fact that the $700,000 of *paid up shares* in question had been subscribed for and *no statement* was made *as to the way* in which those $700,000 of shares had been *paid for and issued*" (italics ours).

And again on page 320 of the opinion the Court says :

" But there is a *further finding* which gives to the defendants' action a *more serious* character, and that finding is this : '*The prospectus* * * * was issued with the consent and approval of the defendants * * * and was *widely circulated* among the general public.' That prospectus contains the following statement : '(Repeating the language of the prospectus above quoted.)' The defendants therefore *not only did not disclose* to their principals the fact that stock to the amount of $700,000 par value was issued to them and their associates as remuneration for promotion service, *but a prospectus*

containing an *incorrect* and *misleading, if not false,* statement was *issued with their consent and approval"* (italics ours).

The opinion in *Hayward* vs. *Leeson* further states (p. 321) that, upon the *facts of the case,* the company could keep the property and sue the promoter under the rule of *In re Olympia,* 2 Ch. (1898), 153, which is the title below of *Gluckstein* vs. *Barnes* (1900), A. C., 240.

Gluckstein vs. *Barnes* has elsewhere been construed as resting upon the false representation,

> *Hutchinson* vs. *Simpson,* 92 App. Div. (N. Y.), 382, 388.
>
> *In re Lady Forest Gold Mine, Limited,* 1901, 1 Ch, 582, 588 (Ch. Div., 1901),

and not applicable to the present case.

> *Old Dom. M. & S. Co.* vs. *Bigelow, supra,* see Brief, *ante,* p. 50.

In the *Bigelow* case the Massachusetts Court states that the ground of the decision in *Hayward* vs. *Leeson* was the failure of the defendants to disclose to the parties interested as beneficiaries the cost of the property or the profits to themselves as vendors. This assumes, *as was the fact in the Hayward case,* that there were such parties interested, namely, persons invited to subscribe cash for stock in the company, which cash was to be used to pay for the properties and thus complete the sale. In the present case the property was paid for, and the sale completed, by the vendors themselves. Therefore, whether *Hayward* vs. *Leeson* turned upon the question of a false prospectus or upon the purchase of the property with the money of the subscribers, is wholly immaterial, as neither of those grounds exist in the present case.

SECOND POINT.

Defendants are not liable as promoters.

The established rule as to the liability of a promoter upon a sale to the company is as follows:

(1) To the corporation, for rescission or for a recovery of secret profits, at the election of the corporation, where the property has been acquired by the promoter with the means furnished by the subscribers to the corporation, and the promoter has failed to disclose to subscribers any profit resulting to him in the transaction.

Chandler vs. *Bacon*, 30 F. R., 538.
Loudenslager vs. *Woodbury Heights Land Co.*, (1899), 58 N. J. Eq. (13 Dick.), 556, 561.

and other cases.

(2) To the company, for rescission, where the property has been acquired by the promoter with means independent of the corporation or of the subscribers, the promoter, having induced the subscriptions, takes the subscribers' money in payment, fails to disclose his intended profit, and there has been no conscious assent of all the existing interests in the corporation; but in such case the sole relief is *rescission*, and the company may not retain the property and recover the secret profits of the promoter, or damages based upon the difference between the value of the stock paid for the property, and the actual value of the property.

New Sombrero Phosphate Co. vs. *Erlanger*, 5 Ch. Div., 72, 83.

Erlanger vs. *New Sombrero Phosphate Co. & others*, 3 Appeal Cases, 1218, 1235.

In re Ambrose L. T. & C. M. Co., 14 Ch. Div., 390.

In re Cape Breton Co., L. R., 26 Ch. Div., 221.

In re Cape Breton Co. (on appeal), L. R., 29 Ch. Div., 795.

Burland vs. *Earle*, Appeal Cases, (1902), 83 (Privy Council).

Insurance Press vs. *Montauk Wire Co.*, 103 App. Div., 472, 476 *et seq.*, N. Y.

And many other cases.

(3) To the company for *damages* where the promoter, although acquiring the property by his independent means, makes false representations to the subscribers of the stock of the company as to the cost of the property to himself.

Gluckstein vs. *Barnes* (1900), Appea Cases, 240.

Yeiser vs. *U. S. Board & Paper Co.*, 107 Fed. R., 340, 347.

Hayward vs. *Leeson*, 176 Mass., 310, 320, 321,

and other cases.

The acts of the defendants set forth in the complaint created no liability as promoters.

The term "promoter" is ambiguous, and in each case what the so-called promoter did must be ascertained before liability can be inferred.

In Lindley's Law of Companies, 5th Ed., 349, it is stated :

"Care must be taken not to be misled by words. Owing to the ambiguity in the meaning of the word

promoter * * * it is unsafe to say that any particular person was a promoter of a particular company, and to infer from thence that he is liable to account to it as if he had been its trustee. The question in each case must be what has the so-called promoter done to make himself liable to the demand against him? What fraud or breach of trust has he committed or been a party to? If none, he is under no liability; if any, he is liable accordingly." * * *

In *Lindley, etc., Co.* vs. *Bird*, L. R. (1886), 33 Ch. Div., 85, at page 93, LINDLEY, L. J., uses the following language:

"Moreover, to say that James Bird was a promoter of the company and therefore liable to account to it, is calculated to mislead; for the word 'promoter' is ambiguous, and it is necessary to ascertain in each case what the so-called promoter really did before his legal liabilities can be accurately ascertained. In every case it is better to look at the facts and ascertain and describe them as they are."

Calling them "promoters" does not impose any liability.

In *Hutchinson* vs. *Simpson*, 92 App. Div., at page 398, the following language was used:

"I do not suppose that calling them promoters itself imposes any liability. It is the relation that in fact existed between the persons upon whom a liability is sought to be imposed and the corporation in whom vests the cause of action which is sought to be enforced that must determine the question as to the liability of the defendants. If, as between the corporation and the individual defendants, a fiduciary relation is established, then of course there is imposed upon the agent or trustee the obligations that follow from that relation, but to establish that liability the relation must be shown to exist." * * *

Defendants were not promoters in the sense of the term as applied hitherto in any case in which they

have been held liable as such. In all the cases where the Courts have held the parties liable as promoters the transactions have been between the defendants and the future subscribers. In the present case all of the transactions took place between the defendants and themselves (the company), and before there were any purchasers (Record, p. 12, Par. Nineteenth), or any subscribers, or any offer to future subscribers (Record, pp. 8, 9).

If any cause of action arose to the complainant company by reason of the acts of the defendants, it must have arisen at the time and before any other stock was offered or sold.

All the acts of the defendants had been done at that time. If no cause of action existed at the time of the completion of the transactions complained of, none thereafter could arise by reason of such previous acts.

THERE WAS NO RELATION OF PROMOTERS TO SUBSCRIBERS.

The Associates did not *subscribe* for any stock. By agreement (p. 4) they joined with Bigelow and Lewisohn. They *covenanted* with Lewisohn and Bigelow for a *profit* in *cash* or in stock and took that profit (30,000) shares in stock. They *covenanted* for the return of their advances in cash but they *bought* their other stock (30,000) shares from Lewisohn and Bigelow (*fol.* 21) under the option afterward offered to them.

When the 20,000 shares were offered there was no company thereafter to be formed which the subscribers were solicited to join. The company was already formed and possessed all its property. Afterward it offered for sale stock for cash *without statement or inducement* (*fols.* 16, 19). The subsequent subscribers were, therefore, not approached as parties to form a corporation thereafter to take over property or to join a corporation which had

already taken over any *stated* property or which had any *stated* capital stock, either issued or authorized.

Promoters as such only become liable because of their transactions with subscribers to the stock of the company, whose subscriptions they solicit in order to obtain the money from the company.

If the defendants, by causing the company to sell to subscribers the remaining unissued 20,000 shares of the stock, incurred any liability, it would be to such subscribers, and not to the company. The cause of such liability must have arisen after the transactions complained of had been entirely completed, and the injury, if any, caused by such acts would be to the subscribers and not to the company.

THE COMPANY WAS NOT INJURED BY THE ACTS OF THE DEFENDANTS IN CAUSING THE SALE OF THE REMAINING CAPITAL STOCK FOR WORKING CAPITAL.

The company received the cash in full.

If it had not been injured before the sale of the 20,000 shares, it was not injured by such sale; it was never injured, and therefore has no cause of action.

As to the 130,000 shares of stock issued for the properties and the mining claims, the defendants were in no sense promoters. They owned the property individually; they organized themselves into a company; they dealt with themselves, and no one else; and they took back from themselves the stock of the company which they owned, in exchange for the property which they owned. They certainly were not promoters to themselves, and, up to and including the completion of the transaction by which they received the 130,000 shares of stock from their company, they had no transactions with anyone else. They, therefore, were not promoters as to anyone else. Nor can directors be held to be promoters merely because for the purpose of obtaining capital to work the properties already ac-

quired by the company, they offer to subscribers for cash the remaining unissued capital stock of an existing corporation at par, in the absence of any representations or statements in offering the stock. Nor does their intention so to do, had by them at the outset, before they organized the company, make them subsequently promoters.

NO FIDUCIARY RELATION EXISTED BETWEEN THE ORGANIZERS AND THE TECHNICAL CORPORATION.

Blum vs. *Whitney*, 185 N. Y., 232, 242.

Any liability must be predicated upon their relations with the subscribers. Their relations to such subscribers are determined solely by the transactions between those parties.

THE FIDUCIARY RELATION MUST RESULT, IF AT ALL, FROM SOME AGREEMENT TO THAT END, EXPRESS OR IMPLIED, BETWEEN TWO OR MORE PERSONS.

In re Ambrose Tin & Copper Mining Co., L. R. (1880), 14 Ch. Div., 390.
In re Coal Economizing Gas Co. (Gover's Case), L. R. (1876), 1 Ch. Div., 182, 187.
Erlanger vs. *New Sombrero Phosphate Co.*, L. R., 3 App. Cas. (1878), 1218.
Spaulding vs. *No. Milwaukee Townsite Co.*, 106 Wis., 481, at p. 491.
Old Dominion Copper Co. vs. *Bigelow*, 188 Mass., 315, at pp. 321, 322.

In *Brewster* vs. *Hatch*, 122 N. Y., 349, the Court recognized and expressly declared the direction which the inquiry should always take in deter-

mining whether a so-called promoter is or is not to be charged with the duties and disabilities of a fiduciary. The question always is, What was the contract of the so-called promoter, as gathered from the writings between the parties and the representations by which the exchange of papers was induced? The Court said (p. 359):

"The question is, was the relation between these litigants simply that of vendor and vendees of shares to be issued, or was it one of trust and confidence, binding the defendants to the exercise of good faith and to disclose such information as they possessed affecting the value of the property in which the plaintiffs were induced to purchase an interest. * * * The *true relation* existing between these parties must be sought for in *the contracts* found by the Court to have been entered into, in the *prospectus* which the defendants put forth, and in the circumstances involved in the transaction" (italics ours).

Whether the intention to offer the remaining stock to subscribers for cash was formed before or after the directors organized the company and transferred the property to it, in no wise affects their relation to such subscribers. In all of the cases where promoters have been held liable as such to the company it will be noted that either *an appeal* has been made to subscribers *before the corporation* is formed to furnish the means to purchase the properties, or, after the corporation has been formed, to furnish cash to the company, formed with *stated* properties, in return for its stock, the promoters reimbursing themselves for the property out of the cash furnished upon such statement.

The authorities cited by appellant are to the effect that where stock is sold *to obtain the means with which to purchase the properties* transferred to the company, relief may be had at the instance

of the company in behalf of purchasers of such stock (Petitioner's Brief, pp. 18–27).

In those cases *prospectuses were issued* and the *money of the subscribers* was *used* to *acquire* the properties.

This distinction has been clearly pointed out and followed.

Tompkins vs. *Sperry, Jones & Co.*, 96 Md., 560, 581.
Salomon vs. *Salomon* (1897), A. C., pp. 22, 33.
In re British Seamless Paper Co., L. R., V. Ch. A., p. 467.
Old Dominion C. M. & S. Co. vs. *Bigelow*, 188 Mass., pp. 315, 321.

In *Tompkins* vs. *Sperry, Jones & Co.*, *supra*, the Court says (p. 581):

"The proposition that no fraud is involved in the transmutation of property suitable to the purposes of a corporation into the form of corporate securities in the manner adopted by Sperry and Jones in the present instance has been recently decided after a full examination and discussion of the subject by the House of Lords in *Salomon* vs. *Salomon*, App. Cases, 1897, p. 22, and was also adopted in *In re Ambrose Lake Tin Co.*, L. R., 14 Chy. Div., 390. * * *

There is no real conflict between these authorities and those relied on by the appellant. In *Gluckstein* vs. *Barnes*, L. R. App., 1900, p. 240, and *Erlanger* vs. *New Sombrero Phosphate Co.*, L. R., 3 App. Cas, 1218, the promoters had a secret profit in the land, which the corporation was formed to take over, and they issued a prospectus which did not disclose the fact, and thereby induced other persons to subscribe to the stock."

In *Salomon* vs. *Salomon & Co.* (1897), A. C. 22, the attempt was made to apply the doctrine of *Erlanger* vs. *New Sombrero Phosphate Co.* to a

case in which all the stock and bonds had been originally issued to persons owning the property, as in the present case. The House of Lords, in distinguishing the *Erlanger* case, say (p. 33):

"But if every member of the company—every shareholder—knows exactly what is the true state of the facts, * * * no case of fraud upon the company could here be established. * * *

Assuming the price paid for the business was an exorbitant one, * * * when all the shareholders are perfectly cognizant of the conditions under which the company is formed and the conditions of the purchase, it is impossible to contend the company is being defrauded."

In *Old Dominion C. M. & S. Co.* vs. *Bigelow*, *supra*, the Massachusetts Court says (188 Mass., p. 321):

"When the defendant and Lewisohn bought this real estate they were under no obligation to make the purchase of it for the plaintiff corporation, which was not then in existence. Having bought the property at that time and paid for it with what, as between them and the plaintiff corporation, was their own money, they could have kept it or resold it to the plaintiff corporation or to anybody else, as they saw fit. The fact that the property was bought with a view to reselling it to a corporation to be organized for the purpose, and that that purpose was ultimately carried into effect, does not give to the corporation subsequently organized in execution of the original purpose a right to the benefit of such purpose" (citing cases).

In re British Seamless Paper Co., *supra*, is referred to *ante* (Brief, p. 15).

In the present case the complaint shows that Bigelow and Lewisohn raised the moneys to purchase all the properties transferred to the complainant company, including the real estate, the sale of which is sought to be rescinded (Record, p. 3, *fols.* 6–7).

The subsequent issue of 20,000 shares of capital stock by the complainant is stated in the complaint (*fols.* 5 and Par. Fifteenth, *fol.* 15) to have been for the purpose of obtaining working capital for the corporation and *no misrepresentation* as to the value of the properties already possessed by the company is alleged to have been made by Bigelow or Lewisohn in inducing these subscriptions.

IF SUCH MISREPRESENTATIONS HAD BEEN MADE, BIGELOW AND LEWISOHN WOULD HAVE BEEN PERSONALLY LIABLE, *not to the company but to the subscribers* FOR THE DAMAGES SUSTAINED *by each.*

Tompkins vs. *Sperry, Jones & Co.*, 96 Md., 560, 581.
Pomeroy Eq. Jur., 3rd Ed., Vol. 3, § 1099, p. 2116.

In Petitioner's Brief, *Dickerman* vs. *Northern Trust Co.*, 176 U. S., 181; *Re Leeds & Hanley Theatres* (1902), 2 Ch., 809, and *Re British Seamless Paper Box Co.*, L. R., 17, Ch. D., 467, are chiefly relied upon. Upon the facts of those cases, neither of them is in point.

In *Dickerman* vs. *Northern Trust Co.* (*supra*), mere options were acquired, the properties not being furnished by the promoters. The stock of the company was issued in payment of the properties, a secret profit being taken by the promoters or agents, who arranged the consolidation of the various properties into one corporation. The Petitioner also relies upon this case for a sufficiently sweeping definition of the word "promoter" to include the present case. The definition quoted by the learned Justice in delivering his opinion was adopted from Cook on Stockholders, Section 651, and must equally with the author thereof, be taken with reference to

the context, which was, in the case then under consideration, the state of facts therein existing, and, in the mind of the text writer, the various cases from which the definition was evolved. Neither the learned Justice nor the text writer could have expected that the definition adopted would ever be applied so literally as to render it absurd. Under Petitioner's construction it was applicable in every one of the many cases in which the Courts have refused to apply it.

In *Re Leeds & Hanley Theatres* (*supra*), promoters through an agent agreed to sell to the company, and a prospectus was issued inviting subscriptions. Out of the cash obtained from the subscribers the purchase price of the property was paid, the promoters receiving a large part of it. The Court, by WRIGHT, J., in his opinion points out that the defendants never intended to buy as their own the property and that the purchase was not completed until they had caused the company to provide most of the means. VAUGHAN WILLIAMS, L. J. and ROMER, L. J., dwell upon the important effect of the prospectus in inducing the subscribers to furnish the money which was used, and upon the fraudulent nature of the prospectus.

In *Re British Seamless Paper Box Co.* (*supra*), where, under appellant's construction, the definition adopted in *Dickerman* vs. *Northern Trust Co.* (*supra*), might also have been followed, the Court refused to impose any promoter's liability. The language of *dicta* in the opinion, however, is again misapplied by Petitioner in aid of its contention. The expression occurring in the opinion "future allottees" must be taken with reference to the context and not to mean any and all allottees, however invited to subscribe and regardless of the circumstances attending their subscriptions. The opinions quoted from contain express references to the im-

portance of a prospectus or inducement held out to "future allottees."

Separate consideration of other cases cited by the Petitioner is unnecessary, as all of them, either from the statements of fact given in the brief or contained in the reports, are plainly inapplicable.

The present case is radically different from all others where the defendants were held liable as promoters. In the present case the subscribers were offered stock in a corporation already organized and *possessing the entire assets* (Record, pp. 9, 10, par. Sixteenth). Where defendants have been held as promoters, the subscribers were invited to pay cash to the corporation to be used by the promoters to purchase the property. In the present case the purchasers of stock *trusted nothing* either to the discretion or to statements of the promoters. In the other cases the purchasers *trusted everything* to the *discretion* or *statements* of the promoters.

THERE WAS NO FRAUD UPON EITHER THE COMPANY OR THE SUBSCRIBERS TO THE 20,000 SHARES OR INJURY TO EITHER.

We have seen that there was no fraud *upon the company* in the issue of the 130,000 shares of stock to the defendants for the mining properties and for the mining claims. We have also seen that there was no fraud practiced by the defendants by representations to the subscribers.

Neither was there any injury inflicted.

In effect the company being Lewisohn and Bigelow simply gave paper certificates to itself in return for property received from itself.

It is idle to suppose that any one invited to subscribe to shares of a corporation *already possessed*

of property would imagine for a moment that the property had been acquired by the corporation from the owners thereof *without profit* to those owners.

In the absence of representations, all that the intending subscriber considers is the probability of the company developing its property and increasing the value of their investment.

WHAT THE PROPERTY COST IS OF NO CONCERN TO THE SUBSCRIBERS UNLESS BY A SPECIFIC STATEMENT THEY ARE MISLED AND INDUCED TO PURCHASE.

THIRD POINT.

Rescission, where possible, the sole relief.

EVEN IF OTHERS HAD BEEN INTERESTED IN THE COMPANY THE COMPLAINANT WOULD BE ENTITLED, NOT TO DAMAGES, BUT ONLY, IN A PROPER CASE, TO RESCISSION.

If directors sell to a company, in which others are interested, property, either at an overvaluation or without disclosing the cost to themselves of the property, the relief open to the company is disaffirmance of the contract, when possible, in a suit for rescission, where jurisdiction can be had *over all the sellers.*

The failure of persons, holding a fiduciary relation and dealing with their *cestui que trust*, to *disclose the cost* of property sold is not such fraud as will permit the *cestui que trust* to retain the property and recover *damages* as for *deceit.*

Aliud est celare aliud tacere.

The cases to be found in the reports in which failure to disclose is held to be a ground for damages are, without exception, where concealment by tending to create a false impression, amounted to misrepresentation.

THE FAILURE OF THE TRUSTEE OR DIRECTOR TO FULFILL HIS DUTY AND DISCLOSE THE COST OF THE PROPERTY SOLD BY HIM, IN THE ABSENCE OF ANY MISREPRESENTATION ON HIS PART, DOES NOT CONSTI-

TUTE CONCEALMENT OR DECEIT SOUNDING IN DAMAGES, BUT ONLY AFFORDS THE BENEFICIARY THE RIGHT, UNDER PROPER CIRCUMSTANCES, TO RESCIND THE TRANSACTION.

New Sombrero Phospate Co. vs. *Erlanger*, L. R., 5 Ch. D., p. 72, 83.
Erlanger vs. *New Sombrero Phosphate Co. & others*, 3 Appeal Cases, 1218.
In re Ambrose L. T. & C. M. Co., 14 Ch. Div., 390.
In re Cape Breton Co., L. R., 26 Ch. Div., 221.
In re Cape Breton Co. (on appeal), L. R., 29 Ch. Div., 795.
Ladywell Mining Co. vs. *Brookes*, L. R. (1887), 35 Ch. Div., 400.
Bentinck vs. *Fenn*, L. R. (1887), 12 App. Cases, 652, 658, 659, 664, 671.
Burland vs. *Earle*, Appeal Cases, 1902, p. 83.
Great Luxembourg R. R. vs. *Magnay*, 25 Beav., 586.
Re Lady Forrest Gold Min. Li't'd., L. R. (1901), 1 Ch. Div., 582, 588, 589, distinguishing *Gluckstein* vs. *Barnes*.
Higgins vs. *Lansingh*, 154 Illinois, 301, 380.
Insurance Press vs. *Montauk Wire Co.*, 103 App. Div., 472, N. Y.

In *Erlanger* vs. *New Sombrero Phosphate Co.*, *supra*, the Lord Chancellor, Lord CAIRNS, at page 1235, says:

"The part of the case of the respondents which, as an alternative, sought to make the appellants account for the profit which they made on the re-

sale of the property to the respondents, on an allegation that the appellants acted in a fiduciary position at the time they made the contract on the 30th of August, 1871, is not, as I think, capable of being supported, and this, as I understand, was the view of all the judges in the courts below."

In *re Ambrose L. T. & C. M. Co.*, 14 Ch. Div., 390, the Court says (p. 398), by COTTON, L. J. :

"* * * That the company are at liberty to treat these persons as trustees of the property for the company, and, treating them as trustees, to allow them only what they paid for the property, and if they got anything else out of the coffers of the company, to make them account for that. Neither on principle nor on authority can that be maintained, unless at the time when the so-called vendor acquired the property he either acquired it for the company or was in such a position of fiduciary relation to the company that any purchase made by him of property available for the company must be considered as a purchase made by him as a trustee for the company. * * * I can quite understand an action to set aside the contract altogether, but it is not the course adopted by the company. I can see no ground either on principle or authority on which the company can say, not seeking to set aside the contract: 'We will hold you as passing this to the company, not because you originally acquired it for the company, but because you entered into a contract to sell to the company which is not binding, and therefore we make another contract to take it from you for what it originally cost you, making you account for whatever else under that invalid contract you stipulated should be paid for it.' I am of opinion that this cannot be maintained, and therefore the order we have to deal with cannot stand."

In *re Cape Breton Co.*, L. R., 21 Ch. Div., 221, the Court, Pearson, J. (p. 230), cites with approval the reasoning of Lord Justice Cotton *In re Ambrose*

L. T. & C. M. Co., supra, also the language of Lord Cairns in *Erlanger* vs. *New Sombrero Phosphate Co., supra*, and held that while the company might have the choice either to affirm the contract or rescind it, a *third course proposed* to be taken, namely, to *keep* the *property* and ask the vendors practically now to enter into a new contract and to be considered as having sold the property, not for the price at which they agreed to sell it, but for the price at which they themselves had purchased it, was a *relief unknown to the Court* and which *could not* be given.

Upon the subsequent appeal in the case (L. R., 29 Ch. Div., 795), the decision of the Court below was affirmed, Cotton, L. J., after full discussion, adopting the views of Justice Pearson below, and FRY, J., saying (p. 812) as follows:

"I think that the case is one in which the adoption of the contract by the principal puts an end, and ought to put an end, to any further rights against the agent. It appears to me that to allow the principal to affirm the contract, and after the affirmance to claim, not only to retain the property, but to get the difference between the price at which it was brought and some other price is, however you may state it, and however you may turn the proposition about, to enable the principal against the will of his agent, to enter into a new contract with the agent, a thing which is plainly impossible, or else it is an attempt on the part of the principal to confiscate the property of his agent on some ground which, I confess, I do not understand."

In *Burland* vs. *Earle*, *supra*, the judgment of the House of Lords and Privy Council was delivered by Lord DAVEY, who said (p. 98):

"Both courts have held that the re-sale (purchase) was *by Burland's (a director) advice and influence, and was made without disclosing to the company* the price at which he had purchased. It was also

held in the same court of appeal that Burland had bought the property with the intention and for the purpose of reselling it to the company. * * * But their Lordships do not think it necessary to pursue these topics, because they are of opinion that the relief prayed by the amended statement of claim and granted in the court below is altogether misconceived. There is no evidence whatever of any commission or mandate to Burland to purchase on behalf of the company, or that he was in any sense a trustee for the company of the purchased property. * * * Let it be assumed that the company or the dissentient shareholders might by appropriate proceedings have at one time obtained a decree for rescission of the contract. But that is not the relief which they ask or could in the circumstances obtain in this suit. The case seems to their Lordships to be exactly that put by Lord Cairns in *Erlanger* vs. *New Sombrero Phosphate Co.* (Lord Davey proceeds to quote the language of Lord Cairns hereinabove quoted.) * * * Reference may also be made to the judgments of Pearson, J., and Cotton and Fry, L.JJ., *in re Cape Breton Co. To rescind the sale is one thing, but to force on the vendor a contract to sell at another price is a totally different thing*" (italics and bracketed words ours).

The *Massachusetts* case, cited and relied upon by petitioner on this point (Brief, p. 68) affirms the rule denying recovery of profits (188 Mass., 315, 321), citing *Parker* vs. *Nickerson*, 137 Mass., 48; *New Sombrero Phosphate Co.* vs. *Erlanger, supra; Erlanger* vs. *New Sombrero Phosphate Co., supra*, and *Ladywell Mining Co.* vs. *Brookes, supra.*

Parker vs. *Nickerson*, *supra*, relied upon by petitioner is not only thus expressly distinguished by the Massachusetts Court, *supra*, but also by the nature of the property sold, coal, having a market value and obtainable in the market, *In re Cape Breton Co.*, L. R. 29, Ch. Div., 795. COTTON, J., page 805.

Of the other cases cited on Petitioner's Brief, pp. 67, 68, 71, those in which alternative relief was given are inapplicable, the defendants therein having either purchased the property with the subscribers' money or made false representations. In none of them was the sole existing fault of defendant mere failure to state the cost of the property to him.

Cases where defendant is not the owner or vendor but makes a secret commission or profit as agent are also inapplicable, nothing having come from him.

The Supreme Court of Massachusetts, in holding *contrary to the explicit rule* and *extended reasoning of the above cases*, that, solely because of the failure of Lewisohn and Bigelow to disclose the cost to themselves of the property transferred, the complainant company is entitled to retain the mining claims and at the same time to recover from Bigelow or Lewisohn the difference between the value which the Court may put upon those claims and the shares paid for them *neither cites authority* nor affords *any discussion or reason* for its holding beyond the statement that Bigelow and Lewisohn were "promoters."

Being promoters does not, however, involve them in all sorts of liability (cases cited under Second Point), and the Massachusetts Court in its opinion points out (188 Mass., pp. 321, 322) that they were not liable for profits, having purchased the property with independent means not acquired from the company.

Nor does any rule laid down in the case of *Hayward* vs. *Leeson*, 176 Mass., 310, cited by the Court (where the same Court held the promoters of a corporation liable to account for the net profits because *of the issuance of a prospectus by such promoters inviting subscriptions to stock, the proceeds of which were used to purchase the proper-*

ties), render promoters liable in the absence of such prospectus, the promoters acquiring the property by their independent means.

The Massachusetts Court, 188 Mass., pp. 326, 327, says:

"If in the case at bar the 96,000 shares not issued to the promoters had been offered to the public for cash to be used in buying the property of the Old Baltimore Company, and for working capital, and had been taken by them, the case at bar would have come directly within the decision in *Hayward* vs. *Leeson*."

The difference in the facts between the two cases is essential, and takes the present case out of the scope of the rule applied in *Hayward* vs. *Leeson*.

This difference has been clearly recognized and commented upon in the authorities above cited in this point.

These authorities emanating from the highest English tribunals, eminent text writers and the Appellate Courts of the States must be considered as outweighing that of the Massachusetts Supreme Court especially when they are accompanied by extensive discussion and sound reasoning upon the particular point and in the absence of discussion in the opposing opinion.

FOURTH POINT.

Albert S. Bigelow is an indispensable party in whose absence a bill for rescission cannot be maintained.

(1) The bill discloses the joint interest of Albert S. Bigelow and of Leonard Lewisohn, defendants' testator.

This disclosure is distinct, emphatic and repeated.

The rescission sought is of the transfer to the complainant of certain mines and mining claims known as the Old Dominion Mine, the New York Mine, the Keystone Mine, and a certain parcel of land in Arizona, all of which had formerly been owned by the stockholders of Old Baltimore Company, the title being held by one William Keyser (Record, p. 3, *fol.* 4), and from him acquired by the said Bigelow and the said Lewisohn.

The complaint at *folio* 5 states that prior to May 24th, 1895, Bigelow and Lewisohn formed the plan of acquiring the said property held by Keyser; that (*fol.* 9, paragraph seventh) on or about June 13, 1895, Bigelow, in conjunction with Lewisohn, for the purpose of carrying out their plan made an agreement with Keyser.

"In pursuance of this plan and conspiracy *they* required said Keyser to undertake to convey said claims and real estate *to them* without payment of any additional consideration upon said executors assenting thereto."

And (*fol.* 10, paragraph eighth) that Bigelow and Lewisohn *for their common benefit* acquired from Keyser the said property theretofore standing in his name.

The complaint further states (*fol.* 10):

"Said conveyance was made to said Leonard Lewisohn and the title to said property was acquired by him for the common benefit of himself and said Bigelow, as hereinafter set forth, and as a part of the plan and conspiracy hereinbefore set forth."

The complaint further states (*fol.* 18):

"The stock of said Baltimore Old Dominion Company and said parcels of real estate were acquired in the manner aforesaid *with intent on* the part of said Leonard Lewisohn and *of said Bigelow* to sell said property of said Baltimore Old Dominion Company and said parcels of real estate for a much larger price."

The complaint further states (*fol.* 19):

"By the transactions above set forth *said Bigelow and* said Leonard Lewisohn carried out their said plan and conspiracy * * * and *acquired* * * * *for themselves as they claimed* * * * all the property conveyed by said Leonard Lewisohn to the complainant * * * thereupon did sell * * * and also sold * * * all the property conveyed to said Leonard Lewisohn." * * *

The complaint further states (*fol.* 28):

"Thereafter, to wit, on or about September 12, 1902, the complainant offered *to said Bigelow and to the respondents* to rescind the sale and conveyance to it from said Leonard Lewisohn of said parcels of real estate in Arizona, to wit, the parcels known as the Old Dominion Mine, the New York Mine, the Chicago Mine, Keystone Mine, and parcel of real estate," etc.

Not alone from the general tenor of the complaint is the joint interest of Bigelow and Lewisohn apparent. Their joint interest is distinctly pleaded, so that there is no doubt, that the transaction sought

to be rescinded was a joint one on the part of Lewisohn and Bigelow.

In fact the complaint offers an excuse for omitting Bigelow as a defendant (*fol.* 29) based on his non-residence within the district.

The formal offer of the real estate to the complainant company was made in the name of Lewisohn (p. 20), probably because the legal title thereto stood in his name, although the property had been, as the complaint repeatedly states, acquired by both Bigelow and Lewisohn for their common benefit, and that they (Bigelow and Lewisohn) sold the same to the complainant.

It will be noted, however, that the formal offer contained a reference to the interest of Bigelow and a request to pay the consideration, namely, 30,000 shares of stock, to Bigelow as well as Lewisohn.

The bill setting forth a joint interest in the subject-matter in Bigelow makes him an indispensable party without whom rescission cannot be had.

Shields et al. vs. *Barrow*, 17 How., 129.

Wall vs. *Thomas et al.*, 41 Fed. Rep., 620.

Bell vs. *Donohoe and others*, 17 Fed. Rep., 710.

Chadbourn et al. vs. *Coe et al.*, 45 Fed Rep., 822.

Ribon vs. *Railroad Companies*, 16 Wall., 446.

Gregory vs. *Stetson*, 133 U. S., 579, 586.

California vs. *Southern Pacific*, 157 U. S., 229, 249.

Minnesota vs. *Northern Securities Co.*, 184 U. S., 199.

Barney vs. *Baltimore City*, 6 Wall., 280, 285.
Bank vs. *Carrollton Railroad*, 11 Wall., 624, 631.
Coiron et al. vs. *Millaudon*, 19 How., 113, 115.
Williams et al. vs. *Bankhead*, 19 Wall., 563, 571, 572.
Arkansas S. R. Co. vs. *Union Sawmill Co.*, 154 Fed. R., 304, 311, C. C. A.
New Sombrero Phosphate Co. vs. *Erlanger*, L. R., 5 Ch. D., pp. 73, 83.
Price vs. *Minot*, 107 Mass., 49, 63.

The cases cited on this point in Petitioner's Brief, pp. 72, 73, are inapplicable.

In *Barney* vs. *Baltimore City*, 6 Wall., 280, held that part owners or tenants in common of real estate in which partition in equity is asked, were indispensable parties.

In *Elmendorf* vs. *Taylor*, 10 Wheat., 152, held that where complainants are tenants in common entitled to a specifically described portion of the whole tract, which does not interfere with the remainder, co-tenants are not indispensable parties.

In *Payne* vs. *Hook*, 7 Wall., 425, held that in a suit by one distributee against an administrator and his sureties, the other distributees were not indispensable parties because the controversy was not with them but with the administrator and his sureties, nothing being alleged against such other distributees.

In *Union Mill & Mining Co.* vs. *Dangberg*, 81 Fed. Rep., 73, the Court held that one tenant in common might in equity restrain an infringement upon his rights to a specific quantity of water from a stream, no co-tenant having or asserting any rights adverse to complainant's claim.

In *Mackay* vs. *Gabel*, 117 Fed. Rep., 873, held that a third person, a grantor in the deed of the property who had parted with all his interests in the property of every character *to the defendant* prior to the commencement of this suit, was not an indispensable party.

NOT ALONE BIGELOW'S RIGHTS BUT DEFENDANT'S RIGHTS REQUIRE BIGELOW'S PRESENCE AS A PARTY TO ANY RESCISSION.

It is only where the director fraudulently misapplies the money or property of a company, in which others than himself are interested, that he can be held liable separately and in damages.

Cunningham vs. *Pell*, 5 Paige Ch., 607, 612, N. Y.
Boyd vs. *Gill*, 19 Fed. R., 145, 146.

The rule as to joint tort feasors does not apply.

Loudenslager vs. *Woodbury Heights Land Co.*, 58 N. J. Eq., 556, 558, 559, 561.

In *Old Dominion C. M. & S. Co.* vs. *Bigelow*, (*supra*), the Massachusetts Supreme Court in its opinion, substantially conceded the indispensability of both Lewisohn and Bigelow as parties to a bill for rescission by *not granting rescission*, but allowing *damages* as for an equitable *tort*, and overruling the demurrer on that ground.

The averment in the bill to the effect that Bigelow is not a resident within the jurisdiction of the Court does not relieve the bill from the difficulty.

It is well settled that neither the Act of Congress nor the 47th Equity Rule enables the Court to

make the decree prayed for in the absence of Bigelow.

Shields et al. vs. *Barrow*, 17 How., 129, 140, 141.

Coiron vs. *Millaudon*, 19 How., 113, 115.

Woodward vs. *McConnaughey*, 106 Fed. Rep., 758, C. C. A.

In *Shields et al.* vs. *Barrow* (*supra*), the opinion of the Court (pages 140, 141 and 142) discusses at length the effect of the Act of Congress, F. Stat. at L., 321, passed February 28, 1839, and the 47th Equity Rule, and held that notwithstanding the Act of Congress and the Rule no decree for rescission could be made in the absence of one of the parties to the original contract.

In *Coiron et al.* vs. *Millaudon et al.* (*supra*), which was a suit to set aside a sale, the Court uses the following language (p. 115):

" Nicolet & Co., and Van Brugh Livingston and wife, the mortgage creditors, or their legal representatives, were therefore necessary parties to the bill, as any decree made in the case disturbing the sale may seriously affect their interests.

This objection has been anticipated in the bill, and an averment made that these parties were out of the jurisdiction of the Court. But it is well settled that neither the Act of Congress of 1839 (5 U. S. Stat. at Large, 321, Sec. 1) nor the 47th Rule of this Court enables the Circuit Court to make a decree in a suit in the absence of a party whose rights must necessarily be affected by such decree, and that the objection may be taken at any time upon the hearing, or in the Appellate Court (17 How., 130; 1 Peters, 299)."

In *Wall* vs. *Thomas* (41 Fed. R.), the Court held (p. 622), as follows:

" Section 737 of the United States Revised Stat-

utes does not affect the question. Nothwithstanding that provision, the Court can make no decree affecting the rights of an absent person, and none between the parties before it which so far involves and depends upon the rights of an absent person that complete and final justice cannot be done between the parties present without affecting those rights (*Shields* vs. *Barrow*, 17 How., 130)."

The tender of the property by the complainant set forth in the bill of complaint (*fol.* 28) is to Bigelow and Lewisohn.

A reconveyance of all of the property to Lewisohn's representatives would obviously deprive Bigelow of his rights in the matter.

On the other hand, no tender or conveyance of less than all the property can be made to either Bigelow or Lewisohn, the property not being capable of any ratable division.

The prayer for relief contains (*fol.* 30) a provision that the representatives of Lewisohn shall return to the complainant the *entire* consideration for the conveyance. This obviously cannot be performed in view of the receipt by Bigelow of a share of the consideration directly from the company.

SO THAT NEITHER CAN THE COMPLAINANT RETURN TO EITHER THE PROPERTY RECEIVED BY IT, NOR CAN IT REQUIRE EITHER BIGELOW OR LEWISOHN *separately* TO RETURN THE ENTIRE CONSIDERATION RECEIVED THEREFOR.

ON BOTH OF THESE GROUNDS THE RESCISSION IS IMPOSSIBLE.

FIFTH POINT.

Rescission in part is not permissible.

The sale of the properties constituted one transaction and the company cannot rescind any part while retaining the rest. The properties were all of the same character—copper mines—situated in the same locality, and held by the same prior owners (pp. 2, 3, Par. Second).

They were all acquired by Lewisohn and Bigelow jointly and for the same consideration (Record, pp. 4, 5, Par. Sixth), and were sold by them to the company on the same day, and at the same meeting (Record, p. 8, Pars. Thirteenth and Fourteenth).

Though the offers were separate in form owing to difference in chain of title, they were parts of the same transaction.

> *Ready* vs. *Pinkham*, 181 Mass., 351, and cases cited;
> *Van Horne* vs. *Crain*, 1 Paige Ch., 455.

Petitioner (Brief, p. 37) rests complainant's case upon the *theory* of one transaction not completed until September 18th, 1895, although on July 11th, 1895, the property had been offered and accepted by the vote of the directors and possession obtained July 12, 1895.

If, as petitioner contends, the offer by the company of July 18th, 1895, to the public of 20,000 shares for cash was *part* of *one* transaction, which included the sale of the property to the company, the sale of those properties was part of *one and the same* transaction. Any theory which unifies the sale of the cash stock by the company with pre-

vious sales of property to the company *ex necessitate* unifies the sales of the property.

PARTIAL RESCISSION IS NOT TOLERATED IN EQUITY.

Perley vs. *Balch*, 23 Pickering, 286.
Sheffield Nickel Co. vs. *Unmen*, 2 Q. B. D., 223.
Morse vs. *Brackett*, 98 Mass., 503.
Merril vs. *Beckwith*, 163 Mass., 503.

SIXTH POINT.

The bill of complaint is multifarious in that different reliefs inconsistent with each other are prayed for.

The bill (Record, p. 26, Par. Twenty-sixth) states at length the desire of complainant for rescission and its offer of reconveyance of the property.

This necessarily involves an *election to rescind.*

Old Dom. Co. vs. *Lewisohn et al.* 136 Fed Rep., 915.

The prayer of the bill is three-fold :

For a decree of rescission of the sale of the real estate made by Bigelow and Lewisohn to the complainant in payment for which the complainant issued and they received the 30,000 shares of the capital stock of the company (*fol.* 30).

In the alternative, "*and in case complainant is not entitled to rescind said sale,*" for an assessment of the damages suffered by the complainant by reason of the sale, and judgment for said damages (*fol.* 30).

For such other relief as to the Court shall seem meet (*fol.* 30).

The first two, the prayer for rescission and the prayer for damages, are distinct and inconsistent.

The first proceeds on the theory *that the sale is void.*

The second proceeds on the theory *that the sale is valid.*

A bill in equity praying for such inconsistent reliefs is multifarious.

Daniels' Ch. Pl. & Pr., 385.

St. Louis, V. & T. H. R. Co. vs. *Terre Haute R. Co.*, 33 Fed. Rep., 440, 448.
Shields vs. *Barrow*, 17 How., 129, 143.
Wilkinson vs. *Dobbie*, 12 Blatch, 298, 301, 302.
Emans vs. *Emans*, 14 N. J. Eq., 114; cited with approval in *Walker* vs. *Powers*, 104 U. S.

WITH ELECTION DECLARED AND RESCISSION INSISTED UPON, THERE CAN BE NO RECOVERY FOR DAMAGES.

Williams vs. *Jackson*, 107 U. S., 478, 484.
Lloyd vs. *Brewster et al.*, 4 Paige, 537 N. Y.
Connihan vs. *Thompson*, 111 Mass., 270.

The judgment should be affirmed, with costs.

Upon the whole case, there was no fraud upon the company in the sale of the properties, all parties interested at the time assenting, or upon the syndicate associates in view of their common interest with Lewisohn and Bigelow in the transaction, or upon the subscribers to the 20,000 shares in view of their relation to the company as vendees purchasing without inquiry, inducement or misrepresentation. The Circuit Court of Appeals in its decision properly followed the rule of *Foster* vs. *Seymour*, and like cases in other jurisdictions.

Both the syndicate associates and the subscribers to the 20,000 shares have assented to the transaction not now and never having complained. The only complaint ever made has no other foundation than a stale and technical claim on behalf of the legal entity of the corporation upon an "artificial case" instituted by other than the original interests and after new interests had come into ownership and control of the company. The suit is therefore not only without equity, but against all the equities.

April, 1908.

Respectfully submitted,

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